UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLAUDE R. WILSON aka CLAUDE RAY WILSON, JR.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 1027E

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of December, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 21, 1996, pursuant to an Order of Sale dated July 26, 1996, of the following described property located in Tulsa County, Oklahoma:

> Lot Thirty-Two (32), Block Two (2), SUNSET ACRES ADDITION, a Subdivision to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendant, Claude R. Wilson aka Claude Ray Wilson, Jr., by publication; and to the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District

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Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

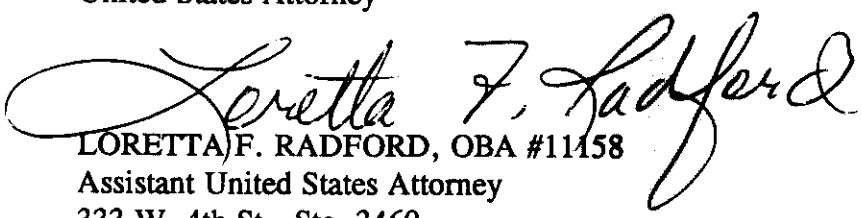
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/esf

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 1027E

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ROBYN RENE UNFER; FLOYD WILLIAM FULLINGIM; LINDA DIANNE FULLINGIM; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	Civil Case No. 95-CV 893E
	)	
Defendants.	)	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of December, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 21, 1996, pursuant to an Order of Sale dated July 26, 1996, of the following described property located in Tulsa County, Oklahoma:

> LOT SEVEN (7), BLOCK ONE (1), BOWLIN ACRES, A SUBDIVISION TO THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Robyn Rene Unfer, Floyd William Fullingim and Linda Dianne Fullingim, by publication; and to the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A.

(22)

Blakeley, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Stephen C. Wolfe, 1325 S. Main, Tulsa, Oklahoma 74119, being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

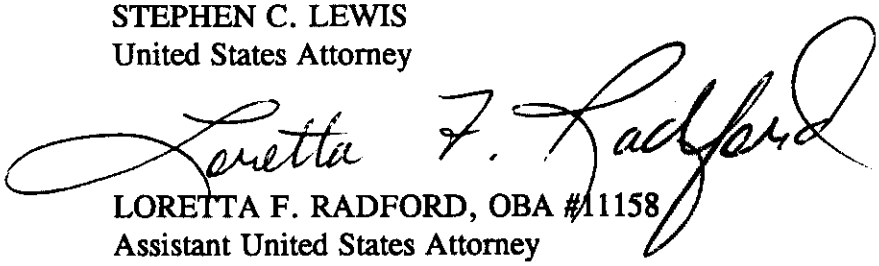
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Stephen C. Wolfe, 1325 S. Main, Tulsa, Oklahoma 74119, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-CV 893E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VIRGINIA COMBRINK, et al.,

Plaintiffs,

vs.

BRUCE BABBITT, Secretary of the Interior, et al.,

Defendants.

Case No. 95-C-87-E

JUDGMENT

Now on this 18th day of December, 1996, the Court finds as follows:

1. By Order of August 18, 1995, the Court resolved certain legal issues between the parties regarding a tribe's own right to resolve election disputes.

2. The election dispute in this case was resolved by the Magistrate Judge of the Court of Indian Offenses for the Tonkawa Tribe. On October 28, 1996, the Magistrate Judge entered an Order approving the special election held on October 26, 1996, and naming a new governing body for the Tonkawa Tribe.

3. Thus, any remaining issues are moot. The Court therefore adopts its Order of August 18, 1995, as the final Order in this case, and enters Judgment in accordance with that Order in favor of the Plaintiff Virginia Combrink and against the Defendants Bruce Babbitt, Secretary of the Interior, et al.

IT IS SO ORDERED THIS 19th DAY OF DECEMBER, 1996.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES F. MOORE, TERESA L. MOORE, MALINDA M. FRANSISCO, individually, and on behalf of T.L., a minor child,

Plaintiffs,

vs.

MUSCOGEE (CREEK NATION)

Defendant.

No. 96-C-604-B

JUDGMENT

In accord with the Order filed this date granting summary judgment to Defendant, the Court hereby enters judgment in favor of Defendant, Muscogee (Creek Nation), and against Plaintiffs, Charles F. Moore, Teresa L. Moore, and Malinda M. Fransisco, individually and on behalf of T.L., a minor child. Costs may be awarded Defendant upon proper application. The parties are to pay their own attorney's fees, if any.

Dated, this 17th day of December, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

(26)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES F. MOORE, TERESA L. MOORE, MALINDA M. FRANSISCO, individually, and on behalf of T.L., a minor child,

Plaintiffs,

vs.

MUSCOGEE (CREEK NATION)

Defendant.

No. 96-C-604-B

ORDER

Before the Court are the following motions: (1) Defendant's Motion to Dismiss Plaintiffs' Petition for Declaratory Judgment (Docket No. 2); (2) Defendant's Motion to Dismiss Plaintiffs' Amended Motion for Declaratory Judgment[1] (Docket No. 6); (3) Plaintiffs' Amended Motion for Declaratory Judgment to Establish the Rights of the Parties (Docket No. 4); Plaintiffs' Motion for Ruling on the Declaratory Judgment[2] (Docket No. 9); and (4) Plaintiffs' Motion for Immediate Possession and Custody of T. L. (Docket No. 16). At the October 11, 1996 hearing, the Court converted defendant's motions to dismiss to a motion for summary judgment and invited the parties to supplement the record with any evidence they wished to add. Plaintiffs filed two supplemental briefs (Docket Nos. 23 and 24) and Defendant filed Supplementary Exhibits (Docket No. 25) under

[1] The Court considers both motions to dismiss (Docket Nos. 2 and 6) filed by defendant (together with the exhibit provided the Court at the October 11, 1996 hearing and defendant's Supplementary Exhibits in Support of Defendant's Motion to Dismiss (Docket No. 25)) to comprise defendant's motion for summary judgment.

[2] The Court construes Plaintiff's Amended "Motion" for Declaratory Judgment (Docket No. 4) and Motion for Ruling on the Declaratory Judgment (Docket No. 9) as a hybrid response/cross motion for summary judgment (which has been supplemented by Plaintiff Terri Moore's Supplemental Filing (Docket No. 24) and Plaintiff Malinda Fransisco's Supplemental Filing for the Motion for Declaratory Judgment (Docket No. 23)).

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seal. After a thorough review of the completed record, the Court grants summary judgment to defendant.

A. Litigation History

On October 6, 1994, plaintiffs Charles F. Moore and Terri L. Moore (the "Moores") filed a Petition for Appointment of Guardian in Tulsa County District Court. *In the Matter of the Guardianship of [T.L.], Tulsa County District Court, Case No. PG-94-276.* In the petition, the Moores sought to be appointed guardians of Terri Moore's biological grandson (hereinafter referred to as T.L.). The petition alleged that Terri Moore's daughter, Malinda Fransisco ("Fransisco"), and Travis Lackey were the parents of T.L. and were unfit and unable to provide for the infant child's care and support. *Defendant's Supplementary Exhibits, Ex. A.*

On October 14, 1994, defendant Muscogee (Creek) Nation (hereinafter "Creek Nation") moved to intervene in the state court, and petitioned to transfer jurisdiction of the case to the Creek Nation, based on §1911(b) of the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §1911(b). *Defendant's Supplementary Exhibits, Ex. B.*

In response to the oral application of Fransisco, by and through her attorneys, Tom H. Bruner and Leslie Shelton, and the Creek Nation's petition, the Honorable Edward J. Hicks, Judge of the Tulsa County District Court, transferred the case to the Creek Nation and entered a Temporary Order dated October 28, 1994, awarding temporary legal custody of T.L to the Creek Nation and physical custody of T.L to Fransisco. *Defendant's Supplementary Exhibits, Ex. D.* On the same day, the District Court of the Muscogee (Creek) Nation entered an Emergency Temporary Custody Order awarding temporary legal custody of T.L. to Muscogee (Creek) Nation Children and Family Services. *Defendant's Supplementary Exhibits, Ex. E.*

Subsequently, on March 14, 1995, the Moores filed a complaint in federal court, Case No.

95-C-236-H, containing numerous charges and requesting "Emergency Jurisdiction and Guardianship and Immediate Custody of Minor Child and Grandson." On May 1, 1995, Fransisco filed a petition for writ of habeas corpus in federal court, Case No. 95-C-395-K, requesting an order of "Jurisdiction, Immediate Possession, Custody and Guardianship" of her minor child. The latter case was reassigned to the Honorable Sven Erik Holmes and the cases were consolidated under Case No. 95-C-236-H.

Both federal complaints were in the nature of a writ of habeas corpus. The plaintiffs alleged *inter alia* that (1)the Creek Nation, specifically Redina Maynard, Indian Child Welfare Coordinator, and Charles Tripp, Assistant District Attorney for the Creek Nation, fraudulently obtained custody of T.L. at the October 28, 1994 guardianship hearing in Tulsa County District Court; and (2) the Creek Nation assumed the care, custody and control of T.L. although he is only 1/128 Creek Indian. *Order dated July 20, 1995, Case No. 95-C-236-H.*

The Honorable Sven Erik Holmes rejected plaintiffs' attempt to invoke federal habeas corpus jurisdiction, finding that a writ of habeas corpus does not extend to child custody matters. Judge Holmes, however, allowed plaintiffs to amend their complaint to state a claim under the ICWA. *Id.* When Plaintiffs' amended complaint simply set forth the same "petition for writ of habeas corpus," and failed to state a claim under the ICWA, Judge Holmes dismissed the case for lack of subject matter jurisdiction. *Order dated November 15, 1995, Case No. 95-C-236-H.*

Rather than appeal the dismissal, plaintiffs filed yet another action in federal court, Case No. 95-C-1149-H, seeking an emergency protective order. Concluding that plaintiffs alleged the same claims alleged in 95-C-236-H, Judge Holmes *sua sponte* dismissed the case for lack of subject matter jurisdiction. *Order dated April 1, 1996, Case No. 95-C-1149-H.* Plaintiffs appealed this ruling.

On August 21, 1996; the Tenth Circuit entered its Order and Judgment in the appeal, holding the following:

> This appeal arises out of an unsuccessful challenge to custody decisions made by the Muscogee (Creek) Nation concerning [T.L.], born in March 1994. The child's father is a member of the Nation and the child is eligible for enrollment. This action was brought pro se by the child's mother, who is part Indian, and the child's grandmother and the grandmother's husband, who are not Indian. The district court dismissed the action upon concluding that it lacked subject matter jurisdiction. Plaintiffs appeal and we affirm.
>
> Plaintiffs filed a prior action asserting virtually the same allegations that are made in the instant case. The district court held in that proceeding that Plaintiffs essentially were challenging the Nation's custody of the child and that the only available avenue of federal court relief was under the Indian Child Welfare Act, 25 U.S.C. §§1901-1934 (ICWA). . . .
>
> . . .
>
> . . . [E]ven when Plaintiffs pleadings are liberally construed and augmented by the material filed with this court, they have failed to show that they have a cognizable claim under the ICWA, or any other provision of federal law called to our attention.

Order and Judgment, No. 96-5009 (D.C. No. 95-C-1149-H), Defendant's Supplement (Docket No. 12), Ex. A.

B. Present Case

On July 2, 1996, Plaintiffs filed this action seeking declaratory judgment that the Creek Nation's jurisdiction over T.L. is invalid under the ICWA. Plaintiffs specifically allege that Redina Minyard and Charles Tripp misrepresented that T.L. was of Indian descent in the state court guardianship proceeding, coerced Fransisco into agreeing to transfer jurisdiction to the Creek Nation, and coerced the Moores into withdrawing their petition for guardianship.

Defendant moved to dismiss this action based on the following grounds: (1) the Court lacks jurisdiction under the doctrine of tribal sovereign immunity; (2) the Court lacks jurisdiction under the ICWA in that §1914 does not apply to tribal courts; (3) this action is barred by res judicata or claim preclusion; (4) the Court lacks jurisdiction to grant federal habeas corpus relief to obtain custody of

a child; (5) the remedy of declaratory relief does not provide an independent basis for maintaining this action; and (6) the summons was improperly served.

At the October 11, 1996 hearing, the Court converted defendant's motion to dismiss to a motion for summary judgment. As the record is now complete, defendant's motion for summary judgment is at issue.

C. Creek Nation's Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Windon Third Oil and Gas v. Federal Deposit Insurance Corporation*, 805 F.2d 342, 345 (10th Cir. 1986), *cert den.* 480 U.S. 947 (1987). In *Celotex*, 477 U.S. at 322 (1986), it is stated:

> [T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material fact." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585-86 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of the pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc., supra*, at 252.

Although this action is plaintiffs' fourth attempt to challenge the Creek Nation's jurisdiction over, and custody decisions concerning T.L., the minor child involved in this dispute, plaintiffs have

again failed to state or establish any claim for relief.

The Creek Nation as a tribal sovereign possesses common law immunity from suit. *Puyallup Tribe, Inc. v. Washington Dept. Of Game*, 433 U.S. 165, 172-73 (1977). This immunity is subject to the superior and plenary control of Congress and thus may be waived by Congressional action. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1977). Any waiver of tribal sovereign immunity, however, must be expressly authorized by Congress. *Id.*; *United States v. Testan*, 424 U.S. 392, 399 (1976) (waiver of sovereign immunity "cannot be implied but must be unequivocally expressed").

In this most recent cause of action, Plaintiffs apparently rely on §1914 of the ICWA as the basis of this Court's jurisdiction:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

25 U.S.C. §1914. The Court finds that this reliance is misplaced.

First, §1914 applies to "any action for foster care placement or termination of parental rights **under State law**," while the action plaintiffs seeks to invalidate here is the foster care placement **under tribal law**. As the Supreme Court noted, the ICWA was enacted

> to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." House Report, at 23. It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," ibid., and by making sure that Indian child welfare determinations are not based on a "white middle-class standard which, in many cases, forecloses placement with [an] Indian family." Id., at 24.

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989). The purpose of §1914 thus is to provide a check on state court, not tribal court, foster care placement or termination of

parental rights. *Morrow v. Winslow*, 94 F.3d 1386, 1394 (10th Cir. 1996). Second, the Moores have no standing to sue. Neither Mr. or Ms. Moore is the parent or Indian custodian from whose custody T.L. was removed. The only plaintiff with standing, therefore, is Fransisco. Finally, assuming *arguendo* that plaintiffs could bring a claim against the Creek Nation under §1914 of the ICWA, plaintiffs have not established any violation of §§1911, 1912 or 1913.

Plaintiffs, in essence, claim that §1911(b) has been violated. This section concerns the transfer of proceedings from state to tribal court:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

The Court sees no such violation. The undisputed facts are that (1) Fransisco, the child's natural mother, made oral application to transfer and the Creek Nation formally moved to transfer the custody dispute to the tribal court, *Defendant's Supplementary Exhibits, Ex. D*; (2) the Creek Nation accepted the transfer and exercised jurisdiction over the matter, *Defendant's Supplementary Exhibits, Exs. C and E;* and (3) the Moores voluntarily withdrew their guardianship petition in state court. *Plaintiffs' Supplemental Filing for the Motion for Declaratory Judgment.*

Plaintiffs now argue that Fransisco's consent to transfer was fraudulently obtained by the Creek Nation's representatives, Minyard and Tripp. However, all plaintiffs present in support are plaintiffs Terri Moore's and Fransisco's allegations of fraud and coercion, and the "Object To Transfer" purportedly signed by Fransisco on October 31, 1994, four days after her application to

transfer to tribal court, which states:

> I, Malinda M. Fransisco, natural mother of [T.L.], born March 26, 1994, object to the transfer of jurisdiction, Case Number PG 94 276, from the Tulsa County District Court to the Muscogee (Creek) Nation Tribal Court.

Plaintiffs' Amended Motion, Ex. C.

The Court finds such insufficient to defeat summary judgment. Fransisco's statements are not under oath or presented by way of affidavit. Nor is there any verification that Fransisco's objection to the transfer was ever aired, let alone filed, in the state court proceeding. *Appearance Docket Guardianship, PG-94-276, Exhibit to Plaintiffs' Response to Motion to Dismiss (Docket No. 5).* To the contrary, the Temporary Emergency Order entered by Judge Hicks transferring the case to the Creek Nation District Court expressly states that Fransisco was represented by counsel and made oral application to the court to transfer the case to the tribal court. And most recently on July 31, 1996, while contesting the tribal court's jurisdiction over the matter in this Court, Fransisco, again represented by counsel, consented to the jurisdiction of the tribal court, stipulated to the tribal court's finding that T.L. was a deprived child, and " agreed that the minor Indian child shall remain in his current foster care placement with legal custody of said child in [Creek Nation's] Child and Family Services Administration and that the natural parents shall contact the caseworker to arrange visitation." *Combined Order of Adjudication and Disposition, In the Matter of [T.L], Case No. JV94-34, District Court of the Muscogee (Creek) Nation.*[3] Finally, in submitting the issue of the foster care and custody of her son to the tribal court, Fransisco has waived any objection she may now have to the jurisdiction of that court in that matter. *See LeBeau v. Dakota*, 815 F.Supp. 1074, 1077 (W.D. Mich. 1993).

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[3] Defendant presented this exhibit to the Court during the October 11, 1996 hearing.

Based on the reasons set forth above, the Court grants summary judgment (converted motions to dismiss) to defendant Creek Nation (Docket Nos. 2 and 6) and denies plaintiffs' Amended Motion for Declaratory Judgment, Motion for Ruling on Declaratory Judgment and Motion for Immediate Possession and Custody of T. L. (Docket Nos. 4, 9 and 16).

ORDERED this 17th day of December, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ONE PARCEL OF REAL PROPERTY KNOWN AS:
16614 CAYUGA ROAD
WYANDOTTE, OTTAWA COUNTY,
OKLAHOMA,
AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON,

Defendant.

Civil Action No. 96-CV-924B

ORDER STAYING CASE

THIS MATTER coming on for consideration before the undersigned Judge of the United States District Court for the Northern District of Oklahoma this 19th day of December, 1996, upon the Joint Motion for Stay, and the Court, being fully advised in the premises, finds that pursuant to the Joint Motion of plaintiff and counsel for Claimant Richard Lynn Dopp, the captioned case should be stayed pending conclusion of the related state criminal prosecution in Ottawa County, Oklahoma, under Case CF-96-267 and that the Claimant, Richard Lynn Dopp, shall not be required to file his answer herein until further order of this Court.

IT IS THEREFORE, ORDERED by the Court that the case be stayed pending conclusion of the related state criminal prosecution in Ottawa County, Oklahoma, under

(8)

Case CF-96-267 and that Claimant Richard Lynn Dopp shall not be required to file his answer herein until further Order of this Court.

The parties are further directed to file a joint report on the status of Claimant Richard Lynn Dopp's related state criminal prosecution in Ottawa County, Oklahoma every sixty (60) days, the first report being due February 15, 1997.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GLENN ROYAL,

Plaintiff,

vs.

NIKE, CORPORATION,

Defendant.

Case No. 96-C-718-B

ORDER

The Court has for consideration Plaintiff Glenn Royal's ("Royal") application for entry of default and judgment. (Docket # 8). Also considered herein is Defendant NIKE, Inc.'s ("NIKE") motion to dismiss Royal's Complaint pursuant to Fed.R.Civ.P. 8 and 12. (Docket # 9). After careful review of the record and applicable legal authorities, the Court hereby DENIES Royal's application for entry of default and judgment and GRANTS NIKE's motion to dismiss.

On August 8, 1996, Royal, appearing *pro se*, filed a Civil Rights Complaint pursuant to 42 U.S.C. § 1983. Royal's Complaint prays for $14,500,000.00 in negotiable compensation from NIKE for alleged trademark infringement. The Court allowed Royal to proceed *in forma pauperis*. On November 5, 1996, Royal moved for entry of default and judgment against NIKE on the grounds NIKE failed to appear or otherwise answer. Two days later, November 7, 1996, the United States Marshall's Office filed a return of service reflecting service of process upon one Dorothy Hatla, NIKE Corporate Affairs. The return of service listed October 24, 1996 as the date of service. Royal's Complaint specifically grants NIKE one hundred and eighty (180) days from the date of service to file an answer. NIKE's time to appear or otherwise answer has yet to expire. The Court hereby DENIES Royal's application for entry of default and judgment as premature.

(11)

On November 8, 1996, NIKE moved to dismiss Royal's Complaint pursuant to Fed.R.Civ.P. 8 and 12. On December 3, 1996, after noticing Royal had failed to timely respond to NIKE's motion to dismiss, the Court by minute order directed Royal to respond to NIKE's motion to dismiss on or before December 16, 1996. This extension of time, coupled with the time allowed by N.D. LR7.1 (C), afforded Royal a total of thirty-eight (38) days in which to file any response. The Court also warned Royal his failing to respond could result in the granting of NIKE's motion. As of December 19, 1996, Royal had not responded to NIKE's motion to dismiss.

It appears from the record that the instant action is a repeat of an earlier ill-fated attempt by Royal to sue NIKE for trademark infringement. In mid-1990, Royal sent to NIKE an envelope containing a request for information on NIKE products and where they could be purchased. NIKE responded to Royal's request. On February 5, 1993, Royal filed an incomprehensible Civil Rights Complaint (42 U.S.C. § 1983) against NIKE. *See* Northern District of Oklahoma Case No. 93-C-0107-E. United States District Judge James Ellison dismissed Royal's Complaint without prejudice for failure to allege any facts, and granted Royal twenty (20) days to file an amended Complaint. Royal chose not to amend; thus, the case was closed.

The instant Complaint sets forth three "Counts" and appear to be Royal's attempt to enunciate causes of action against NIKE. Count 1 deals with trademark infringement and unfair competition. Count 2 discusses a definition of "goods." Count 3 is a recitation of what is a trademark, according to Royal. The gist of Royal's instant Complaint appears to be similar to the previously dismissed action.

Fed.R.Civ.P. 8 (a)(2) requires "[a] pleading which sets forth a claim for relief,...shall contain...(2) a short and plain statement of the claim showing that the pleader is entitled to relief."

The only section of Royal's Complaint which remotely resembles a claim for relief reads as follows:

> (A)(2) Supporting facts: The named Defendant Nike, Corporation based in Beaverton, Oregon, on or about May 25, 1990, received my letter of Glenn Royal, 2221 N. Lansing Ave. Tulsa, Oklahoma 74106, asking to obtain a Nike catalog pertaining to its goods.
>
> Nike, Corporation design firm without the corporation, agents, conferring with written consent toward negotiating with plaintiff's, independent outside design firm, as assignee has infringed plaintiff's independent tennis trademark design from that of plaintiff's envelope on or about May 25, 1990.
>
> The Defendant Nike, Corporation did, respond to plaintiff by returning a letter stating where to purchase Nike, products on or about May 25, 1990.

This is not a short and plain statement of the claim showing that Royal is entitled to relief. Thus, the Court hereby GRANTS NIKE's motion to dismiss pursuant to Fed.R.Civ.P. 8.

Conclusion

Royal's application for entry of default and judgment is DENIED. NIKE's motion to dismiss pursuant to Fed.R.Civ.P. 8 is GRANTED.

IT IS SO ORDERED this 19th day of December, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARK W. VANN; BRENDA A. VANN aka BRENDA ANN VANN; CITY OF TULSA, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 1029H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of December, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 21, 1996, pursuant to an Order of Sale dated July 26, 1996, of the following described property located in Tulsa County, Oklahoma:

> Lots One (1) and Two (2), Block Two (2), LYNNWOOD ADDITION, a Subdivision to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Mark W. Vann and Brenda A. Vann, by publication; and to the Defendants, City of Tulsa, Oklahoma, through Alan L. Jackere, Assistant City Attorney, and the County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District

Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

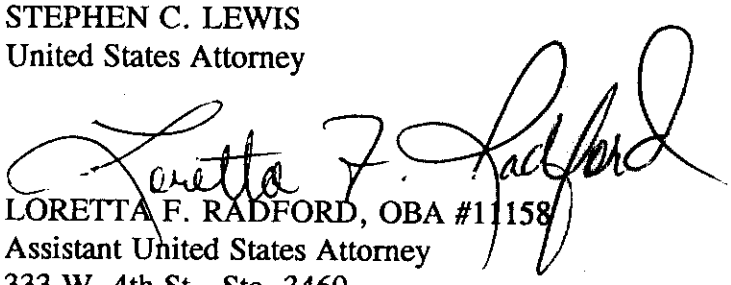
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/esf

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 1029H

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 20 Day of December, 1996.

C. Patillo, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

GERALD LEE COBB aka Gerald L. Cobb;
LORI D. COBB aka Lori Deana Cobb
nka Lori Deana Clark;
COMMUNITY BUILDERS, INC.;
STATEWIDE MORTGAGE COMPANY;
STATEWIDE ACCEPTANCE CORPORATION;
BANK ONE TEXAS, N.A. as Trustee for
Statewide Acceptance Corporation
1993-A Title I Trust Fund;
COUNTY TREASURER, Rogers County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Rogers County, Oklahoma;
THOMAS CLARK, III, Spouse of Lori Deana Clark,

Defendants.

CIVIL ACTION NO. 95-C-1150-H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of December, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 22, 1996, pursuant to an Order of Sale dated July 22, 1996, of the following described property located in Rogers County, Oklahoma:

LOT 4 IN BLOCK 1 OF SPRING MILL SOUTH ADDITION TO THE CITY OF CLAREMORE, ROGERS COUNTY, OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

Appearing for the United States of America is Cathryn D. McClanahan, Assistant United States Attorney. Notice was given the Defendants, **Gerald Lee Cobb aka Gerald L. Cobb; Lori D. Cobb aka Lori Deana Cobb nka Lori Deana Clark; Community**

Builders, Inc., through G. J. Wolter, **President; Statewide Mortgage Company** through Harvey Denman, Executive Vice President; **Statewide Acceptance Corporation**, through William Keith Marshall, Vice President; **Bank One Texas, N.A. as Trustee for Statewide Acceptance Corporation 1993-A Title I Trust Fund**, through its attorney Matthew M. Julius; **County Treasurer** and **Board of County Commissioners, Rogers County, Oklahoma,** through Michele L. Schultz, **Assistant** District Attorney, Rogers County, Oklahoma; and **Thomas Clark, III, Spouse of Lori Deana Clark**, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Claremore Daily Progress, a newspaper published and of general circulation in Rogers County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 95-C-1150-H (Cobb)

CDM:cse

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 20 Day of December, 1996.

C. Portillo, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DANIEL STORTS, individually and as next friend of Jonathan Shane Storts, PAM STORTS, individually and as next friend of Jonathan Shane Storts,

Plaintiffs,

v.

GRACO CHILDREN'S PRODUCTS, INC., and SERVICE MERCHANDISE COMPANY,

Defendants.

Case No. 95-CV-1007-H

ORDER OF CONDITIONAL DISMISSAL

The parties herein have advised the Court that they have entered into a settlement agreement in the above-captioned case.

Pursuant to such agreement, no later than January 15, 1997 the parties will file either (i) an agreed-upon judgment, or (ii) an agreed-upon order of dismissal, each of which has been executed contemporaneously herewith. This case is hereby dismissed, provided that the parties conform to this condition of dismissal. If, by January 26, 1997 neither the judgment nor the order of dismissal has been filed, the Court will dismiss this action with prejudice.

IT IS SO ORDERED.

This 18TH day of December, 1996.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of Rural Housing Service,
formerly Farmers Home Administration,

Plaintiff,

v.

PATRICIA G. LEDBETTER, a single person;
DWAYNE GILBERT aka Gary D. Gilbert;
KAY GILBERT aka Glenda K. Gilbert;
COUNTY TREASURER, Pawnee County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Pawnee County, Oklahoma,

Defendants.

CIVIL ACTION NO. 96-CV-171-H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of December, 1996, there comes on for hearing before the Magistrate Judge the **Motion** of the United States of America to confirm the sale made by the United States Marshal **for the** Northern District of Oklahoma on October 29, 1996, pursuant to an Order of Sale **dated July 22**, 1996, of the following described property located in Pawnee County, Oklahoma:

> **Lot 26, Block 1, Crestview Addition to the City of Cleveland, Pawnee County, State of Oklahoma, according to the recorded plat thereof, subject, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record.**

Appearing for the United **States** of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the **Defendants, Patricia G. Ledbetter, a single person; Dwayne Gilbert aka Gary D. Gilbert; Kay Gilbert** aka **Glenda K. Gilbert; County Treasurer, Pawnee County, Oklahoma and Board** of County Commissioners, Pawnee

County, Oklahoma, through Alan B. Foster, Assistant District Attorney, Pawnee County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Pawnee Chief, a newspaper published and of general circulation in Pawnee County, Oklahoma, and that on the day fixed in the notice the property was sold to Lyle Ballard and Joan Ballard, HC 66 Box 890, Hominy, Oklahoma 74035, they being the highest bidders. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, Lyle Ballard and Joan Ballard, HC 66 Box 890, Hominy, Oklahoma 74035, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchasers by the United State Marshal, the purchasers be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 96-CV-171-H (Ledbetter)

CDM:cas

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 20 Day of December, 1996.

C. Patella, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TERRY BATES,

Plaintiff,

v.

MARVIN T. RUNYON,

Defendant.

Case No. 96-C-100-H

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on December 13, 1996.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiff.

IT IS SO ORDERED.

This 18TH day of December, 1996.

Sven Erik Holmes
United States District Judge

12-20-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUDITH ANN TARVER fka JUDITH ANN SCALES-PITTS; CLIFTON TARVER; CITY OF TULSA, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 699K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of December, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 21, 1996, pursuant to an Order of Sale dated August 8, 1996, of the following described property located in Tulsa County, Oklahoma:

> Lot Fifteen (15), Block Nineteen (19), VALLEY VIEW ACRES ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendant, Judith Ann Tarver, by publication; and to the Defendants, Clifton Tarver, City of Tulsa, Oklahoma, through Alan L. Jackere, Assistant City Attorney, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail, and they

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do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

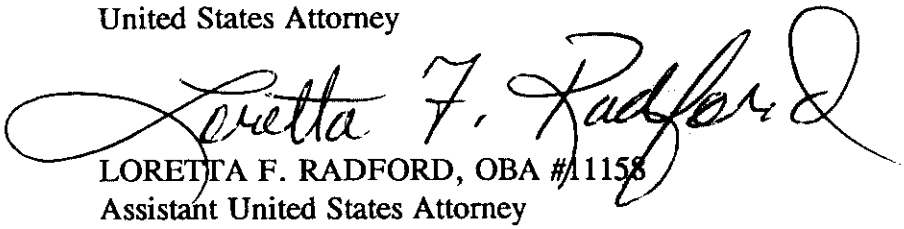
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
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333 W. 4th St., Ste. 3460
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LFR/esf

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 699K

12-20-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JEWEL G. ESKRIDGE a/k/a JEWEL G. ESKRIDGE TREMBLE; WILLIAM T. LAWRENCE, JR; SHARON TAYLOR, Tenant; STATE OF OKLAHOMA ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; SANDRA L. JOHNSON aka SANDRA JOHNSON; McKINLEY JOHNSON; and STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, et al.	)	
	)	
Defendants.	)	CIVIL ACTION NO. 94-C-685-K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of December, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 21, 1996, pursuant to a Second Order of Sale dated August 30, 1996, of the following described property located in Tulsa County, Oklahoma:

> Lot Two (2), in Block One (1) NORTHGATE 3RD ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded Plat thereof.

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Appearing for the United States of America is Phil Pinnell, Assistant United States Attorney. Notice was given the Defendants, State of Oklahoma ex rel. Oklahoma Employment Security Commission though its attorney, David T. Hopper, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakleley, Assistant District Attorney, State of Oklahoma ex rel. Oklahoma Tax Commission, through Kim D. Ashley, Assistant General Counsel, Sandra L. Johnson aka Sandra Johnson, and McKinley Johnson, by mail; and the Defendants, Jewel G. Eskridge aka Jewel G. Eskridge Tremble and William T. Lawrence, Jr., by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Second Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Second Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of

Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

PP/esf

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C-685-K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONNA LOWE,

Plaintiff,

v.

TOWN OF FAIRLAND, Oklahoma, a Municipal Corporation, BEVERLY HILL, DON JONES, SHIRLEY MANGOLD, LORETTA VINYARD, BILL PINION, RICHARD JAMES, and WALLACE, OWENS, LANDERS, GEE, MORROW, WILSON, WATSON & JAMES, A Professional Corporation,

Defendants.

No. 96-C-0066 K

FILED
DEC 19 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL AS TO DEFENDANTS PINION, JAMES, AND THE LAW FIRM OF WALLACE, OWENS, LANDERS, GEE, MORROW, WILSON, WATSON & JAMES, A Professional Corporation

NOW ON THIS 18th day of December, 1996, this Court finds and orders that Plaintiff's case against Defendants Bill Pinion, Richard James and the law firm of Wallace, Owens, Landers, Gee, Morrow, Wilson, Watson & James, a Professional Corporation is hereby dismissed with prejudice to future refiling. Each party shall bear its own costs and attorneys' fees.

Judge of the District Court

382\92\dismiss.ord\eld\gdn

ENTERED ON DOCKET
DATE 12-20-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE L. SALLEE, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 95-C-788-K ✓
	)	
EVANS & ASSOCIATES, a Delaware corporation,	)	
	)	
Defendant.	)	

FILED
DEC 19 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 18th day of December, 1996.

Terry C. Kern

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RILANDRA F. BATISE; UNKNOWN SPOUSE OF Rilandra Batise; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95cv 1192BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 19th day of December 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney; and the Defendant, RILANDRA F. BATISE, appears not.

The Court being fully advised and having examined the court file finds that the Defendant, RILANDRA F. BATISE, signed a Waiver of Summons on January 3, 1996.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on December 12, 1995; that the Defendant, CITY OF BROKEN ARROW,

Oklahoma, filed its Answer on December 26, 1995; and that the Defendant, RILANDRA F. BATISE, filed her Affidavit on February 14, 1996.

The Court further finds that the Defendant, RILANDRA F. BATISE, is a single unmarried person, as shown by the Affidavit filed on February 14, 1996.

The Court further finds that on July 2, 1991, Rilandra F. Batise, filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-B-2296 C. On October 22, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on December 30, 1991.

The Court further finds that on April 19, 1996, Rilandra F. Batise, filed her voluntary petition in bankruptcy in Chapter 13, in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 96-01426-C. On June 23, 1996, the United States Bankruptcy Court for the Northern District of Oklahoma ordered the Automatic Stay be Modified and the Property to be Abandoned. On July 30, 1996, the Debtor's Chapter 13 Plan was confirmed, and on October 21, 1996, the Bankruptcy Court authorized the foreclosure to continue, and the bankruptcy was dismissed.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT TEN (10), MAE MEADOW ADDITION, PART OF THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER (SW/4 SE/4), SECTION THREE (3), TOWNSHIP SEVENTEEN (17) NORTH, RANGE FOURTEEN (14) EAST OF THE INDIAN BASE AND MERIDIAN, CITY OF BROKEN

ARROW, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on June 24, 1987, Herman E. Nichols, Jr. and Cherry C. Nichols, executed and delivered to INLAND MORTGAGE CORP., their mortgage note in the amount of $73,438.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Herman E. Nichols, Jr. and Cherry C. Nichols, husband and wife, executed and delivered to INLAND MORTGAGE CORPORATION a mortgage dated June 24, 1987, covering the above-described property. Said mortgage was recorded on June 26, 1987, in Book 5034, Page 2212, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 24, 1987, INLAND MORTGAGE CORP., assigned the above-described mortgage note and mortgage to MORTGAGE CLEARING CORP., of Oklahoma. This Assignment of Mortgage was recorded on September 9, 1987, in Book 5050, Page 1180, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1988, MORTGAGE CLEARING CORP., assigned the above-described mortgage note and mortgage to TRIAD BANK, N.A. This Assignment of Mortgage was recorded on July 18, 1989, in Book 5195, Page 644-973, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 6, 1990, TRIAD BANK N.A., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage

was recorded on August 9, 1990, in Book 5270, Page 258, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendant, RILANDRA F. BATISE, currently holds the title to the property by virtue of a General Warranty Deed, dated April 27, 1989, and recorded on April 28, 1989, in Book 5180, Page 1244, in the records of Tulsa County, Oklahoma, and is the current assumptor of the subject indebtedness.

The Court further finds that on July 19, 1990, the Defendant, RILANDRA F. BATISE, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on July 29, 1991, February 18, 1992, July 10, 1992 and January 13, 1993.

The Court further finds that the Defendant, RILANDRA F. BATISE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, RILANDRA F. BATISE, is indebted to the Plaintiff in the principal sum of $93,016.35, plus interest at the rate of 10.5 percent per annum from September 15, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $998.00, plus penalties and interest, for the year of 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, claims no right, title or interest in the subject property except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, RILANDRA F. BATISE, in the principal sum of $93,016.35, plus interest at the rate of 10.5 percent per annum from September 15, 1995 until judgment, plus interest thereafter at the current legal rate of 5.45 percent per annum until paid, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $998.00, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no, right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, RILANDRA F. BATISE and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, RILANDRA F. BATISE, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $998.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED:

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County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

MICHAEL R. VANDERBURG
City Attorney, Broken Arrow, Oklahoma
220 S. First Street
Broken Arrow, Oklahoma 74012
(918) 251-5311
Attorney for Defendant,
City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 95cv 1192BU

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 19 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEC 20 1996

UNITED STATES OF AMERICA,
on behalf of Farm Service Agency,
formerly Farmers Home Administration,

Plaintiff,

v.

RANDALL W. MCCOIN,

Defendant.

CIVIL ACTION NO. 96-CV-826-C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 19th day of Dec, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney; the Defendant, Randall W. McCoin, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, Randall W. McCoin, executed a Waiver of Service of Summons on September 12, 1996.

It appears that the Defendant, Randall W. McCoin, has failed to answer and his default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit for the purpose of foreclosure of security agreements securing certain promissory notes on personal property (chattels) located in Ottawa County, Oklahoma, within the Northern District of Oklahoma.

The Court further finds that Randall W. McCoin, a single person, executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Farm Service Agency, the following promissory notes.

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Loan Number	Original Amount	Date	Interest Rate
44-02*	$28,810.00	04/12/83	10.25%
43-03**	5,640.00	10/05/84	5.00%
43-04***	7,160.00	04/09/85	5.00%
44-05****	6,320.00	04/09/85	10.25%
44-06	20,756.18	08/17/87	8.75%
44-08	5,035.40	08/17/87	8.75%
43-09	4,149.98	08/17/87	4.50%
43-10	5,993.51	08/17/87	4.50%
44-11	8,000.00	11/28/90	9.00%

*Rescheduled to 44-06 **Rescheduled to 43-09 ***Rescheduled to 43-10 ****Rescheduled to 44-08

The Court further finds that as collateral security for the payment of the above-described notes, Randall W. McCoin executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Farm Service Agency, the following financing statements and security agreements thereby creating in favor of the Farmers Home Administration, now known as Farm Service Agency, a security interest in certain crops, livestock, farm machinery and motor vehicles described therein.

Instrument	Dated	Filed	County	File Number
Financing Stmt.		05/12/81	Ottawa	1065
Continuation Stmt.		03/17/86	Ottawa	0423
Continuation Stmt.		06/04/91	Ottawa	19
Continuation Stmt.		12/05/95	Ottawa	1803
Financing Stmt.		12/09/87	Ottawa	1563
Continuation Stmt.		12/10/92	Ottawa	1228
Financing Stmt.		12/18/90	Ottawa	1265
Continuation Stmt.		07/18/95	Ottawa	1036
EFS-1	12/06/90	12/13/90	Secretary of State	9016563
EFS-1		09/27/94	Secretary of State	9408886

Instrument	Dated	Filed	County	File Number
Security Agreement	05/11/81			
Security Agreement	12/16/81			
Security Agreement	04/12/83			
Security Agreement	03/22/84			
Security Agreement	03/29/85			
Security Agreement	03/18/86			
Security Agreement	03/05/87			
Security Agreement	03/16/88			
Security Agreement	03/09/89			
Security Agreement	06/15/90			
Security Agreement	06/07/91			
Security Agreement	06/08/92			

The Court further finds that the Defendant, Randall W. McCoin, made default under the terms of the aforesaid notes and security agreements by reason of his failure to make the yearly installments due thereon, which default has continued, and that by reason thereof the Defendant, Randall W. McCoin, is indebted to the Plaintiff in the principal sum of $35,149.57, plus accrued interest in the amount of $7,642.27 as of March 7, 1996, plus interest accruing thereafter at the rate of $7.5692 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of Farm Service Agency, formerly Farmers Home Administration, have and recover judgment against the Defendant, Randall W. McCoin, in the principal sum of $35,149.57, plus accrued interest in the amount of $7,642.27 as of March 7, 1996, plus interest accruing thereafter at the rate of $7.5692 per day until judgment, plus interest thereafter at the current legal rate of 5.45 percent per

annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Randall W. McCoin, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the personal property involved herein and apply the proceeds of the sale as follows:

> First:
> In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said personal property;
>
> Second:
> In payment of the judgment rendered herein in favor of the Plaintiff.

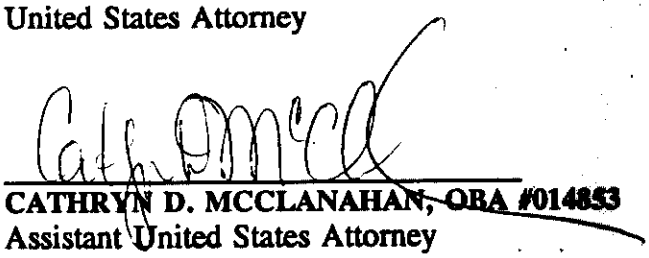
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the personal property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject personal property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
333 West 4th Street, Suite 3460
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(918) 581-7463

Judgment of Foreclosure
Case No. 96-CV-826-C (McCoin)

CDM:ccw

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 19 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JANET E. BELL,

Plaintiff,

vs.

SIMMONS FOODS, INC., formerly Simmons Industries, Inc., an Arkansas corporation,

Defendant/Third-Party Plaintiff,

GEORGE CHARLES ADAMS,

Defendant,

LINDA LOU HEATHERLY,

Third-Party Plaintiff.

Case No. 96-C-239-BU

ENTERED ON DOCKET

DATE DEC 20 1996

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 19th day of December, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ODA L. LOVELACE,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner, Social Security Administration,

Defendant.

NO. 94-C-497-M

ORDER

This case is hereby reversed and remanded in accordance with the 10th Circuit Court of Appeals ORDER AND JUDGMENT dated October 21, 1996 and filed in this Court December 17, 1996.

SO ORDERED this 19th day of December, 1996.

Frank H McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

P. CHIMA NWAOKELEME,

Plaintiff,

vs.

STORY WRECKER, INC.,
OF NORTH ELWOOD
TULSA, OKLAHOMA,

Defendant.

Case No. 96-C-1151-BU

ORDER

On December 12, 1996, the plaintiff, P. Chima Nwaokeleme, pro se, filed a complaint seeking the release and delivery by the defendant, Story Wrecker, Inc. of North Elwood, Tulsa, Oklahoma, of a 92 Lexus SC 400 and seeking damages against the defendant in the amount of $193,800.00. The complaint was accompanied by the $120.00 filing fee as required by 28 U.S.C. § 1914(a). Upon initial review of the complaint, the Court finds that it lacks subject matter jurisdiction over this case and that the plaintiff's complaint must be dismissed in its entirety.

In order for a case to be heard in federal court, the district court must have subject matter jurisdiction over the case. The facts alleging subject matter jurisdiction must be pleaded in a complaint. Fed.R.Civ.P. 8(a)(1). The court's subject matter jurisdiction is limited and is set forth generally in 28 U.S.C. §§ 1331 and 1332. Under these statutes, subject matter jurisdiction is available only when a "federal question" is presented (28 U.S.C. § 1331) or when a plaintiff and a defendant are of diverse citizenship and the amount in controversy exceeds $50,000.00 (28

2

U.S.C. § 1332).

"The Federal Rules of Civil Procedures direct that "'[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.'" Tuck v. United Services Automobile Association, 859 F.2d 842, (10th Cir. 1988)(quoting, Fed. R. Civ. P. 12(h)(3)). "'A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking.'" Id. (quoting, Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974)). Lack of jurisdiction cannot be waived and jurisdiction cannot be conferred upon a federal court by consent, inaction or stipulation." Id.

The Court finds that the plaintiff's complaint does not provide a basis for subject matter jurisdiction. The plaintiff has not alleged a claim against the defendant which arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. Thus, no federal question is presented. In addition, the plaintiff does not allege that he and the defendant are of diverse citizenship, that is, citizens of different states. Instead, the plaintiff lists his and the defendant's addresses as being in Tulsa, Oklahoma. As a defendant must be a citizen of a different state from the plaintiff in a diversity case, see, Harris v. Illinois-California Exp., Inc., 687 F.2d 1361, 1366 (10th Cir. 1982), the Court finds that subject matter jurisdiction is not available under section 1332.

Based upon the foregoing, Plaintiff's Complaint is **DISMISSED**

for lack of subject matter jurisdiction.

Entered this 19th day of December, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PATTY BLEDSAW,

Plaintiff,

vs.

HEIDELBERGER DRUCKMASCHINEN AKTIENGESELLSCHAFT, a foreign corporation,

Defendant.

Case No. 96 CV 127 BU

ORDER OF DISMISSAL

This matter comes on before me, the undersigned Judge, upon the Joint Application of the parties herein for an Order Dismissing this action. The Court finds that this matter should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-styled cause of action is hereby dismissed with prejudice, without cost to either party.

DATED this 19 day of Dec, 1996.

s/ MICHAEL BURRAGE

JUDGE OF THE DISTRICT COURT

Prepared by:

John F. McCormick, Jr.
Pray, Walker, Jackman,
Williamson & Marlar
900 Oneok Plaza
Tulsa, OK 74103
ATTORNEYS FOR DEFENDANT

7081.14

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN RE: Cinema Properties, Inc.

Case No. 96CV1052K

Appeal From U.S. Bankruptcy Court, N.D. Oklahoma In Re: Cinema Properties Inc., Case No. 96-00999-W
Chapter 11

12-19-96

ORDER DISMISSING APPEAL

COMES ON FOR CONSIDERATION this 18 day of December, 1996 Video Communications, Inc.'s Motion to Dismiss Appeal and after due consideration the Court finds that Cinema Properties, Inc. did not file its Notice of Appeal timely and that this appeal is hereby dismissed.

Jerry C Kern

U.S. DISTRICT COURT JUDGE
N.D. OKLAHOMA

759-7.065:nw

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 18 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

BOONE, SMITH, DAVIS, HURST & DICKMAN, a professional corporation,

Plaintiff,

vs.

IMPACT SOFTWARE PRODUCTIONS, INC., a corporation; BROOK BOEHMLER, an individual; and BILL BICE, an individual,

Defendants.

ENTERED ON DOCKET
DEC 19 1996

Case No. 96-CV914-B

ADMINISTRATIVE CLOSING ORDER

NOW, on this 17th day of December, 1996, there comes on for hearing before me, the Joint Motion of the parties, pursuant to Rule 41 of the local rules of the United States District Court for the Northern District of Oklahoma, for administrative closure of this action.

The parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

(5)

IF, by February 28, 1998, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 17th day of Dec., 1996.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

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ATTORNEYS FOR PLAINTIFF

S:\WPDOC\RBS496\5589-000.ORD
csd 12/10/96

12-18-96

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONNA LOWE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 96-C-0066-K**
	)	
TOWN OF FAIRLAND, Oklahoma, a Municipal Corporation; et al,	)	
	)	
Defendants.	)	

FILED
DEC 17 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE OF DEFENDANTS PINION, JAMES and THE LAW FIRM OF WALLACE, OWENS, LANDERS, GEE, MORROW, WILSON, WATSON, & JAMES, a Professional Corporation

Pursusnat to Fed.R.Civ.Proc. 41(a)(1) the plaintiff and defendants' jointly stipulate that the defendants Bill Pinion, Richard James and the law firm of Wallace, Owens, Landers, Gee, Morrow, Wilson, Watson, & James, a Professional Corporation are and shall be dismissed with prejudice, with each party to bear its on costs and attorneys fees.

Dated this 17 day of December, 1996.

D. Gregory Bledsoe, OBA #0874
1717 S. Cheyenne
Tulsa, Oklahoma 74119-3828

and

Ronald Main
Ronald Main, P.C.
2800 Center, Suit 821
P.O. Box 521150
Tulsa, OK 74152-1150

Attorneys for Plaintiff

ATKINSON, HASKINS, NELLIS BOUDREAUX, HOLEMAN, PHIPPS & BRITTINGHAM

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Tulsa, OK 74103

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY J. GILES,
SS# 447-54-2802
Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner
Social Security Administration,
Defendant.

NO. 95-C-340-M

ORDER

On August 14, 1996, the Court reversed and remanded this case for further proceedings. [Dkt. 13]. Plaintiff has applied for an award of attorney's fees pursuant to the Equal Access to Justice Act ("EAJA") 28 U.S.C. § 2412(d). [Dkt. 14].

ATTORNEY FEES UNDER EAJA

The EAJA requires the United States to pay attorney fees and costs to a prevailing party unless the court finds the position of the United States was substantially justified, or special circumstances make an award unjust. 28 U.S.C. § 2412(d). This case was remanded to the Secretary under sentence-four of 42 U.S.C. § 406(g), Plaintiff is therefore a prevailing party. *Shalala v. Schaeffer*, 509 U.S. 292, 302, 113 S.Ct. 2625, 2632 (1993). To avoid an EAJA award, the United States bears the burden of proving that its position was substantially justified. *Kemp v. Bowen*, 822 F.2d 966, 967 (10th Cir. 1987).

In *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), the Supreme Court defined "substantially justified" as "justified in substance or in the main--that is, justified to

a degree that could satisfy a reasonable person." "Substantially justified" is more than "merely undeserving of sanctions for frivolousness." *Id.*

> [A] position can be justified even though it is not correct, and . . . it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.

Id. at n.2.

The Tenth Circuit has held that "a lack of substantial evidence on the merits does not necessarily mean that the government's position was not substantially justified." *Hadden v. Bowen*, 851 F.2d 1266, 1267 (10th Cir. 1988). The government must establish three components to meet the test of reasonableness: a reasonable basis for the facts asserted; a reasonable basis in law for the legal theory proposed; and support for the legal theory by the facts alleged. *Harris v. Railroad Retirement Board*, 990 F.2d 519, 520-1 (10th Cir. 1993).

This case was reversed and remanded, in part, because the ALJ's decision contained virtually no analysis of the medical evidence in relation to the Listings. That the decision of the Secretary/Commissioner is to contain a discussion of the evidence and a statement of the reasons upon which it is based is a long-standing statutory requirement. 42 U.S.C. § 405(b)(1). The Commissioner has not demonstrated that her position in this case was substantially justified. Accordingly, the Court finds that an award of attorney's fees under the EAJA is appropriate.

Concerning the amount of such fees, the Court notes that the Commissioner has failed to provide a case citation to support her statement that: "current case law

has held that the maximum attorney's fees which can be recovered is $124.00 per hour." [Dkt. 6, p.2]. The Court therefore declines to adopt the Commissioner's proffer of $124.00 as the appropriate hourly amount.

Plaintiff's counsel has calculated the fee amount as if all work in the case were performed in August of 1996. However, the Court finds that § 2412(d) does not authorize indexing of attorney fee awards at current rates. If a cost of living adjustment is applied, it must be calculated with regard to when the services were performed by the attorney. Thus, services rendered in a particular year must be indexed using the cost of living multiplier applicable to that year, and so on for each year in which services were rendered. *See Library of Congress v. Shaw*, 478 U.S. 310 (1986); *Marcus v. Shalala*, 17 F.3d 1033, 1038-40 (7th Cir. 1994); *Chiu v. United States*, 948 F.2d 711, 718-22 (Fed. Cir. 1991); *Perales v. Casillas*, 950 F.2d 1066, 1074-77 (5th Cir. 1992); *Pettyjohn v. Chater*, 888 F. Supp. 1065, 1068-69 (D.Co. 1995).

Plaintiff is directed to apply the following formula to each calendar year in which his attorney rendered services before this Court:

???.??	Average CPI-U for the year in which services were rendered
- 90.90	Average CPI-U for 1981
??.??	Difference in Avg. CPI-U from 1981 to year in which services rendered
÷ 90.90	Average CPI-U for 1981
.??	Percent change in Average CPI-U since 1981
x $75.00	§ 2412(d)'s base rate
$??.??	Increase in § 2412(d)'s base rate due to increase in the cost of living
+ $75.00	§ 2412(d)'s base rate
$???.??	§ 2412(d)'s adjusted base rate due to increase in cost of living
x ???.??	Number of hours of service rendered
$?,???.??	Attorney fee recoverable under § 2412(d)

The above formula should be applied to every calendar year in which services were performed before the Court in this case. The results for each applicable calendar year should then be added together to determine the total attorney fee to which Plaintiff is entitled. Plaintiff shall provide the Court with the results of this calculation within 11 days from the date this Order is filed. Plaintiff's calculations shall be in substantially the same form as described above.

Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act [Dkt. 14] is GRANTED, the amount to be determined based upon calculations to be submitted within 11 days in conformity with this Order.

SO ORDERED this 16th day of December, 1996.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SHEILA CONN,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

FILED

DEC 17 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-266-W

ENTERED ON DOCKET

DATE 12/18/96

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Glen E. Michael (the "ALJ"), which summaries are incorporated herein by reference.

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.[3] He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of sedentary work, with the limitation of needing to sit or stand at will. He concluded that claimant was unable to perform her past relevant work as a customer service representative. He found that claimant was 45 years old, which is defined as a younger individual, had

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[2]Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3]The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

a bachelor's degree in fine arts, and did not have any acquired work skills which were transferable to the skilled or semiskilled work functions of other work. He concluded that there were a significant number of jobs in the national economy which claimant could perform, such as telephone solicitor, semiskilled, and unskilled information clerk. Having determined that there were jobs in the national economy that claimant could perform, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The ALJ ignored medical evidence that claimant could not go through rehabilitation in February of 1992 and testified she could not sit for any length of time, had no grip strength, and was emotionally unstable.

(2) The ALJ ignored the evaluations of claimant's treating physicians that claimant was 50-52% impaired for workers' compensation purposes and thus failed to fully develop the record.

(3) The ALJ mischaracterized claimant's severe mental problems as not severe and did not include her mental problems in his hypothetical question to the vocational expert.

(4) The ALJ did not properly assess the claimant's complaints of pain.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant filed a prior application for disability benefits on November 5, 1991 (TR 67-70). This application was denied on February 27, 1992, and not further pursued (TR 96-98). On July 8, 1992, she filed applications for disability and

supplemental security benefits (TR 100-107). These were denied on September 16, 1992, and also not appealed (TR 120-125). The ALJ properly concluded that, because these prior determinations became final by administrative action, claimant's claim for disability benefits on or before the date of the September 16, 1992 denials was barred on the basis of res judicata, and he found no good cause to reopen those final determinations (TR 22). This finding is not reviewable by this court. Califano v. Sanders, 430 U.S. 99 (1977). The ALJ properly concluded that the relevant period in this case was the period from September 17, 1992 forward, and evidence from that period was properly considered (TR 22, 30-31).

Claimant has relied heavily on medical evidence prior to September 17, 1992, and the court finds that such reliance is not proper. It is true that her treating doctor, Dr. Lawrence Jacobs, first reported that she had lower back and knee pain in March of 1976 (TR 289). In May of 1977, her doctor noted joint tenderness in her hands, shoulders, knees, neck, and back and opined that she had "possible spondyloarthropathy associated with psoriasis." (TR 288). The pain and "swelling" in her spine resulted in a diagnosis of "probable psoriatic arthritis" on September 9, 1977 (TR 286). She developed gastritis secondary to taking nonsteroid anti-inflammatory drugs in November of 1977 (TR 284). By February of 1978, she was diagnosed with possible spondyloarthropathy, sacroilitis, nonarticular rheumatism, and pelvic tension myalgia (TR 282).

In October of 1978, her major joint problems were in her hands, knees, and elbows, and her doctor suggested she might have a systemic rheumatic disease such

as Sjogren's syndrome (TR 279). In May of 1979, her doctor stated that she suffered much retropatellar pain, and the doctor concluded she had "pes anserines bursitis secondary to patella femoral arthritis (TR 277). She returned to the doctor for pain relief on August 15, 1979, when the doctor noted that corticosteroid injections and weight loss seemed to lessen her complaints (TR 277).

Claimant saw her doctor every two to three months for pain relief in 1980 and early 1981, but only once in 1982, 1983, and 1984 (TR 267-276). In March of 1985, she suffered whiplash in a motor vehicle accident and visited her doctor for treatment of neck, shoulder, elbow, and knee pain several times that year (TR 263-266). In February of 1986, she was seen by her doctor for acute pain and numbness in her back and legs, and nerve conduction studies showed "L5 and possibly S1 radioculopathy on the left side." (TR 261). She had disc surgery and was doing well a month later (TR 247, 259). She was released to return to work on March 6, 1986 (TR 246).

Claimant did not consult her physician again until February 5, 1987, when she reported acute low back and hip pain after working in heavy snow (TR 257). She reported that she was having trouble with her boss at work on March 3, 1987 (TR 256). In June of 1988, the doctor reported she was doing well on 100 mg. Meclomen (TR 254).

On February 8, 1990, she sustained a fall at work and was treated for cervical lumbar strain and myofacial pain syndrome and numbness in her joints, especially her neck, back, and hands (TR 295-302). X-rays of her spine showed minute anterior

hypertrophic spurring at C-5, C-6, and C-6, C-7 and narrowing of the L-5 S-1 interspace, but her hips, elbow, and ankle x-rays were negative (TR 312). She received physical therapy and improved (TR 303-316).

Claimant was hospitalized from November 28-30, 1990 after taking an overdose of drugs because of financial and family problems (TR 319-363). She was working at the time (TR 319-373). She was treated at Laureate Psychiatric Hospital for depression from November 30, 1990 until December 10, 1990 (TR 369-422). Upon discharge she was fully oriented and not psychotic or depressed. (TR 371-72).

Claimant was evaluated by Dr. Manuel Calvin for workers' compensation purposes on January 9, 1991 (TR 471-473). The doctor concluded that, although she had been treated with muscle relaxants, anti-inflammatory medications, analgesics, and trigger point injections, she had failed to show any significant clinical improvement in her condition, so he rated her for percent of permanent disability and found she had a total of 52% impairment. (TR 472).

On March 4, 1991, an MRI of claimant's spine showed "degenerative spondylotic process of C5-C6 and C6-C7. Central and lateral disc herniation of C5-C6 on the right. Moderate disc bulge at C6-C7 level centrally." (TR 425). She underwent surgery for a herniated disc on March 30, 1991 (TR 426-443). On May 1, 1991, a repeat anterior cervical diskectomy at C5-C6 was done, following a fracture of the fusion plug (TR 444-458). A July 11, 1991 MRI of claimant's spine showed a protruding midline disc at C6-7 (TR 461). Her doctor reported that she had

full range of motion, but quite a bit of neck and shoulder pain on October 7, 1991 (TR 499).

Claimant was treated for depression at the Star Community Mental Health Center from May 30, 1991 to May 6, 1992 (TR 560-570). She participated in group therapy and was given medication and counseling (TR 560-570).

On December 19, 1991, another MRI was done, which showed: "[t]here is a new finding on the current exam with demonstration of a herniated nucleus pulposus at C6-C7 in the midline with somewhat greater extension to the right than left. There is also loss of the usual lordotic curvature of the cervical spinal canal compared to the study dated July 11, 1991." (TR 510). She was admitted to the hospital on January 8, 1992 with a herniated disk and underwent a third anterior cervical fusion and diskectomy (TR 511-528).

On February 10, 1992, claimant was seen for a work hardening program assessment and found to be "too acute" to enter the program (TR 534-553). It was recommended that she receive physical therapy "with an emphasis on relaxation and a gradual increase in cervical flexibility." (TR 534). Her grip strength was measured and the bilateral grip strength was below the age adjusted norms (TR 531). After this task she complained of pain in her left shoulder, neck, and both hands. (TR 531). Her pinch strength was also below the norms in all positions, and she complained of pain throughout her entire left arm. (TR 531). She walked for 3 minutes 30 seconds at a calculated speed of 1.2 mph using a cane for assistance while walking (TR 531). She stood for 8 ½ minutes, balancing herself with her cane, and appeared to tolerate

this well (TR 532). When attempting to do a writing task, she wrote with her left hand while leaning on her right forearm, and had to stop after three minutes because of pain (TR 532). However, she used both hands to type on a computer for 9 ½ minutes (TR 532). She sat for a total of 49 ½ minutes (TR 532). She reported that during a typical day she showers, dresses, takes care of her dog, and cooks prefixed dinners (TR 532).

Claimant had a psychiatric assessment by Dr. Thomas Goodman on February 12, 1992 (TR 554-556). He noted that she had had many physical problems, as well as marital ones (TR 554). She reported that she had a "chaotic" first marriage involving abuse and later married an ex-convict who was accused of molesting her children (TR 554). The doctor noted that she walked with a cane and also had a rigid cervical brace (TR 555). The doctor concluded she was suffering from an adjustment disorder and a depressive disorder, and would obtain relief if she consulted a psychiatrist (TR 556).

On May 27, 1992, Dr. Karl Detwiler, who had seen claimant periodically from March 20, 1991, reported that, while she had mild neck and shoulder pain, she had normal reflexes and "should undergo vocational rehabilitation training with no overhead lifting and a weight limit of 20 pounds." (TR 572). He stated that these limitations were permanent (TR 572).

On September 14, 1992, Dr. Ashok Kache examined claimant for the Department of Human Services and stated:

> Examination of the neck area reveals exquisite tenderness to palpation in the midline over the spinous processes as well as mild diffuse tenderness in the paraspinals. She is tender practically throughout the entire spine in the midline as well as the paraspinals with increased areas of tenderness in the lower lumbar paraspinals and the adjacent gluteals with some trigger points. Cervical range of motion is limited to 5 degrees in extension, normal flexion, limited lateral bending and rotation. In the lumbar spine, she has flexion to 80 degrees, extension 0, lateral bending 5 degrees to each side, and rotation 5 degrees to each side as well. Straight leg raising is positive bilaterally. Straight leg raising in the sitting position is also positive with patient being unable to extend her legs beyond 70 degrees in extension at the knees.
>
> The patient stands with slightly abnormal posture favoring her left lower extremity. Once again, walking also reveals favoring of her left lower extremity and distinct limp. She has a single end cane. She is unable to come up on her heels or toes. Neurological examination of the upper extremities reveals significantly decreased strength with 7 Kg of hand grip on the right and 6 Kg on the left. There is limitation of shoulder range of motion to about 100 degrees bilaterally in abduction and flexion. Elbow range is within normal limits. Sensory examination reveals patchy areas of decreased pin and touch on both sides but more prominently on the right side . . . . Strength is diminished in both lower extremities but more particularly on the left side in ankle dorsi and plantar flexion as well as proximal muscle groups. Reflexes are hyperactive at both knees and 2+ at the ankles . . . .
>
> I feel that this is an excellent idea for patient to pursue vocational testing and retraining including schooling to once again become a productive individual.

(TR 596).

A letter from Dr. David Valentine, a dentist, dated April 2, 1993, stated that, when he did dental work on claimant, she walked with a cane and had to "reposition her body several times during treatment to relieve pain." (TR 601).

On May 26, 1993, Dr. Goodman did a second psychiatric assessment (TR 605-608). The doctor concluded:

> Psychomotor activity was slightly decreased. Her affect was normal. Her speech was logical and appropriate. I found no indications of hallucinations, delusions or other psychotic manifestations. There was no indication of suicidal tendencies. Her sensorium was clear and she was oriented to time, place and person . . . . Claimant has a rather long history of intermittent emotional upheavals, mostly related to stormy interpersonal relationships and conflicts with her husbands and ex-husbands. She has, on occasion, received counseling for these difficulties . . . . Currently she continues to show essentially signs of emotional instability with some ongoing signs of depression. This probably involves mostly a chronic personality disorder, as well as recurrent adjustment reactions to the various problems in her life, particularly those related to her ex-husband and her current husband. She would probably respond well to treatment, but for one reason or the other has not returned to treatment, although it has been available . . . .
>
> FINAL DIAGNOSES: AXIS I: Depressive disorder, not otherwise specified, probably reactive or adjustment disorder type secondary to the various conflicts in her life. AXIS II: (Principal diagnosis). Personality disorder, not otherwise specified, with emotional instability, dependency and some histrionic features.
>
> The claimant otherwise has retained her basic intellectual abilities. Psychologically, as long as her mood remains stable, I see no reason why psychologically she could not return to the same level of work that she was doing previously. She would benefit greatly from treatment if she will take advantage of it.

(TR 607-608).

Records from the University of Oklahoma Adult Medicine Clinic dated March 4, 1993 to June 4, 1993 showed that claimant was seen for multiple joint pain in her back, shoulders, arms, and legs, and hand and leg numbness several times (TR 610-618). The range of motion in her neck was poor and her motor strength was 3/5 on April 14, 1993, but had improved to 90% by June 4, 1993 (TR 611, 614). She was using a cane on that date (TR 611).

On June 28, 1993, Dr. William Gillock conducted an examination of claimant for workers' compensation special indemnity fund purposes (TR 620-624). The doctor found that she used a cane and that the range of motion in her cervical spine was 45° flexion and extension, 25-35° bending, and 30-35° rotation (TR 622). The range of motion in her spine was 10-20° (TR 623). He concluded that she had a 50% permanent partial disability to the body as a whole, which was no increase in the amount of disability that had been found previously. (TR 472, 623).

An examination of claimant on April 7, 1994, showed that she had a sinus infection and osteoarthritis (TR 632).

There is no merit to claimant's first contention that the ALJ ignored evidence that claimant was not "fit to go through rehabilitation" in February of 1992, testified that she could not sit for any length of time and had no grip strength, and was emotionally unstable. The ALJ properly concluded that the period of time that was relevant to the case was from September 17, 1992 forward, and only evidence from that period was properly considered (TR 22, 30-31). Therefore, the February 10, 1992 report was not relevant evidence.

The ALJ did note that claimant testified at the hearing on April 13, 1994 that she could only sit 15-30 minutes and her hand shakes and cramps if she uses a keyboard (TR 25). However, subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings. Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The ALJ found that examinations done in 1993 and 1994 did not reflect disability so severe that she was totally disabled by

pain, but rather demonstrated "minimal impositions on claimant's ability" to work (TR 27). He noted that her range of motion improved from March to June 1993 and was unlimited on April 7, 1994 (TR 28, 610-618, 632).

The ALJ also noted that claimant had been treated for depression and a suicide attempt, has trouble controlling her emotions, has trouble concentrating, and has low self esteem and not much appetite (TR 25-26). However, he relied on Dr. Goodman's findings on May 26, 1993 that she did not have suicidal tendencies or psychotic manifestations and had normal affect and memory and was oriented (TR 26, 607-608). He noted that Dr. Goodman had concluded that she had histrionic features, which meant that she displayed shifting, intense, exaggerated emotions to get attention from others (TR 27). The ALJ relied on the fact that Dr. Goodman stated that "claimant psychologically could perform her past relevant work," and that there was no evidence that claimant's mood "has not remained relatively stable." (TR 27, 608). The ALJ completed a psychiatric review technique form, concluding that claimant had only slight limitations of daily activities, social functioning, and concentration, and had never had an episode of deterioration at work (TR 27, 33-35). He reviewed her emotional condition in detail before reaching his conclusion that she was able to do some jobs which exist in the national economy.

There is also no merit to claimant's second contention that the ALJ ignored the evaluations of claimant finding her 50% impaired for workers' compensation purposes and thus failed to fully develop the record. It is true that a claimant has the burden of providing medical evidence proving disability but the ALJ has a basic duty of

inquiry to fully and fairly develop the record as to material issues. Baca v. Dept. of Health & Human Servs., 5 F.3d 476, 479-480 (10th Cir. 1993). The court in Baca found that the ALJ should have considered a VA disability rating in making his decision, noting that "[a]lthough findings by other agencies are not binding on the Secretary, they are entitled to weight and must be considered." Id. at 480 (citing Fowler v. Califano, 596 F.2d 600, 603 (3rd Cir. 1979)).

Dr. Calvin's evaluation finding claimant 52% totally impaired was done in January of 1991 and therefore was not within the relevant time period (TR 471-473).

The ALJ did consider the fact that Dr. Gillock had found claimant 50% disabled on June 24, 1993 (TR 25, 28). The ALJ concluded that the University of Oklahoma medical examinations from March to June 1993 were entitled to more weight than the medical examination of Dr. Gillock,

> because the claimant was treated over a significant period of time. . . There is no reasonable method by which the June 1993 examinations [of Gillock and the University], which are separated by only 24 days, can be reconciled. The evidence and the claimant's testimony do not demonstrate any trauma which would account for the wide disparity, Dr. Gillock's medical report does not indicate any trauma suffered after June 4, 1993 and on or before June 24, 1993.

It is clear that the ALJ considered the workers' compensation evaluation and did not fail to fully develop the record in this respect.

There is no merit to claimant's next contention that the ALJ mischaracterized claimant's mental problems as not severe and should have included her mental problems in his hypothetical question to the vocational expert. "[T]estimony elicited by hypothetical questions that do not relate with precision all of a claimant's

impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995).

The only psychiatric report during the applicable period was Dr. Goodman's report dated May 26, 1993 (TR 605-608). The doctor found that she had a depressive disorder related to the conflicts in her life, and a personality disorder with emotional instability, dependency, and histrionic features, but concluded that there was "no reason why psychologically she could not return to the same level of work that she was doing previously." (TR 608).

Claimant's suicide attempt was in November of 1990, and was the result of financial and marital problems at that time (TR 319-363). She received treatment at Laureate Hospital and was mentally healthy when released (TR 371-72). There is no evidence during the relevant period that she suffered major depression, was suicidal, or was not emotionally stable enough to work. The fact that she has been married twice does not show instability, and there is no evidence that she is staying in "abusive relationships," as claimant's counsel contends. Counsel also claims that claimant has been treated with Prozac "for quite some time," but it was not on her list of medications submitted to the ALJ (TR 635) and does not appear on the pages of

the record referenced by counsel. Even if prozac has been prescribed, this does not show that "she had not responded well to that medication," as counsel argues.

The ALJ properly considered claimant's mental condition, reviewed Dr. Goodman's psychiatric evaluation, completed the psychiatric review technique form, and discussed the basis of his conclusions on the form in his decision (TR 26-27, 33-35). He concluded that her depression and emotional instability slightly limited her social functioning and daily activities, but did not preclude her from working (TR 27). He therefore did not need to include any psychological limitations in his hypothetical questions to the vocational expert.

Finally, there is no merit to claimant's contention that the ALJ did not properly assess her complaints of pain. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed what a claimant must show to prove a claim of disabling pain:

> [W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually

> associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "`[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.'" Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had joint pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot

justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

The ALJ referred to Luna and the social security regulations in his decision (TR 26). He noted that the relevant medical records showed minimal restrictions on claimant's ability to work (TR 27). He noted that the March to June 1993 records from the University of Oklahoma revealed that her extremities and back initially had a full range of motion with only minimal tenderness to palpation (TR 28, 610-618). Subsequently there was a minimal reduction but not less than 90% in any case, and, in June 1993, the most recent record showed that she had an infection and osteoarthritis, but no limitation on ranges of motion (TR 28, 610).

There is substantial evidence to support the ALJ's conclusion that claimant's lower extremities were normal, and her upper left extremity had some sensory loss (TR 28-29). While doctors found that she had reduced grip strength in 1992 (TR 531, 596), there were no such findings during the relevant period. There is also evidence to support his finding that she had a reduction of range of motion in her back and needed to sit or stand at will while working (TR 29). He did not fail to consider the pain caused by all her "conditions" or her pain medications, most of which were prescribed before the relevant time period (TR 26-31). No pain medications appear on her list of medications submitted to the ALJ except zostrix cream and ascription (TR 635). No psychologist reported that there was "a psychological component to pain" which the ALJ was required to consider, as claimant's counsel suggests. Nor was there medical evidence to suggest that

claimant's emotional instability would affect her dealings with the public over the telephone if she was so employed. The ALJ was not required to find that her repeated hospitalizations in 1990 and 1991 would preclude her from holding a job years later. The ALJ did not ignore the opinions of claimant's treating doctors during the relevant time period (TR 28, 610-618, 632).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 16th day of December, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\CONN.SS1

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 17 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHEILA CONN,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,[1]

Defendant.

Case No: 95-C-266-W ✓

ENTERED

DATE 12/18/96

JUDGMENT

Judgment is entered in favor of the defendant, Shirley S. Chater, Commissioner of Social Security, in accordance with this court's Order filed December 17, 1996.

Dated this 16th day of December, 1996.

JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

17

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA FIXTURE COMPANY,

Plaintiff,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL NO. 943, and MARY SHIRLEY,

Defendants.

Case No. 96-C-216-B

O R D E R

Before the Court for consideration is Defendants, United Brotherhood of Carpenters and Joiners of America's ("Union's") and Mary Shirley's ("Grievant's"), Motion for Summary Judgment (Docket #4) and Plaintiff Oklahoma Fixture Company's ("OFC's") Cross-Motion for Summary Judgment and Memorandum in Support (Docket #6). Following a thorough review of the record and the applicable legal authority, the Court concludes the Defendants' motion should be GRANTED and Plaintiff's cross-motion should be DENIED.

I. Undisputed Facts

1. The Grievant is an individual and, at all times pertinent herein, was a resident of Tulsa County.

2. The Union is an unincorporated labor organization as defined by 29 U.S.C. § 152(5) and at all times herein had a written, collective bargaining agreement with OFC.

3. OFC is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma.

(9)

4. OFC produces retail store fixtures and architectural millwork in its plant in Tulsa, Oklahoma.

5. The collective bargaining agreement in force between the parties contains a grievance and arbitration clause providing that grievances arising out of the contract be submitted for arbitration by a neutral arbitrator selected from a panel provided by the Federal Mediation and Conciliation Service.

6. Section 5.5(F) of the collective bargaining agreement provides that an employee loses his seniority rights under the following condition:

> With the exception of lay-off, if he has performed no work for the company for a period of one hundred eighty (180) calendar days in a twelve (12) month period (the 180 calendar days does not mean consecutive days) without regard for the reason, the employee has performed no work for the company for such period.

7. On March 22, 1995, the Grievant was terminated from employment by OFC.

8. Prior to March 22, 1995, the Grievant was an employee of OFC and covered by the terms and conditions of the collective bargaining agreement.

9. Pursuant to the terms of the collective bargaining agreement between the parties, a written grievance was filed over the termination of the Grievant, and the matter was referred to arbitration before Dr. Paula Ann Hughes, Ph.D., an arbitrator and professor at the University of Dallas.

10. On or about August 16, 1995, Arbitrator Hughes presided over a hearing in Tulsa, Oklahoma, where OFC and both the Union and

Grievant presented witnesses, exhibits, and gave sworn testimony in evidence concerning the facts of the Grievant's termination on or about March 22, 1995.

11. Following the hearing, the Grievant and OFC both prepared and presented written briefs to the arbitrator for her consideration and aid in determining an award.

12. On or about February 19, 1996, Arbitrator Hughes issued a written award sustaining the grievance and ordering OFC to reinstate the Grievant to her former job upon doctor's release without loss of seniority.

13. On March 19, 1996, OFC filed the Complaint in this action requesting the arbitration award of the Arbitrator Hughes be vacated.

14. The Union and Grievant filed their Answer and Counterclaim on March 25, 1996, requesting the Court to enforce the arbitration award.

II. The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who

> fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative." . . .
>
> A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). Id. at 1521.

III. Legal Analysis

OFC urges this Court to set aside the award of the arbitrator on the grounds that it does not derive its essence from the four corners of the collective bargaining agreement. The Union and Grievant urge this Court to enforce the award alleging the decision draws its essence from the terms and conditions of the collective bargaining agreement between the parties.

There are very few reasons on which the Court may rely to set aside an arbitrator's award. Under United Food and Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc., 889 F.2d 940, 946-47 (10th Cir. 1989), if the Court finds the "essence of the resulting award was not drawn from the collective bargaining agreement," or if "it can be said with positive assurance that the contract is not susceptible to the arbitrator's interpretation," then the Court may set aside an award. The Tenth Circuit also concluded that to set aside an arbitrator's award, it must be "so unfounded in reason and fact, so unconnected with the wording and purpose of the . . . agreement as to 'manifest an infidelity to the obligation of the arbitrator.'" International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO v. Public Service Company of New Mexico, 980 F.2d 616 (10th Cir. 1992) (quoting Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692, 694 (10th Cir. 1977)).

In NCR Corporation, E & M-Wichita v. International Association of Machinists and Aerospace Workers District, 906 F.2d 1499 (10th Cir. 1990), the Tenth Circuit reversed the district court's grant of summary judgment vacating the arbitrator's award, holding that the district court "failed to adhere to the standard of review that has been established by legal precedent in this area." Id. at 1500. The Court further stated:

> [A] court should not reject an award on the ground that the arbitrator misread the contract. . . .[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Id. at 1503 (quoting United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 37-38 (1987)).

The policy behind this narrow standard of review is set forth in Misco:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of awards."

Id. at 36 (quoting Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

Accordingly, even if this Court reviews the arbitration award and believes it is completely against the evidence or a clear misinterpretation of the contract, it may not set aside the award. E.I. DuPont de Nemours and Co. v. Grasselli

Employees Independent Association of East Chicago, Inc., 790 F.2d 611, 614 (10th Cir. 1986).

OFC contends the arbitrator went beyond the scope of the contract by considering extrinsic evidence. However, if the arbitrator finds an ambiguity exists as to the language of the contract, she may consider extrinsic evidence. In NCR Corporation, E & M-Wichita, the Court noted that since the arbitrator "could not resolve the dispute by reference to plain and explicit language found in the contract's terms, the arbitrator turned to an extensive analysis of extrinsic and other evidence. In his opinion the arbitrator reviewed and examined evidence and authorities that would help give meaning to the ambiguous language of the contract." 906 F.2d at 1501.

This is precisely what the arbitrator did in this matter. She found an ambiguity existed in Section 5.5(F) regarding what was meant by an employee performing "no work for the company for a period of one hundred and eighty (180) calendar days in a twelve (12) month period (the 180 calendar days does not mean consecutive days)" and reviewed extrinsic evidence and authorities to help resolve the ambiguity. In doing so, she agreed with the Union that a "reasonable and just interpretation" of Section 5.5(F) is that an employee loses her seniority rights when the "employee has performed no work for a period of one hundred eighty (180) days in which the plant is open with an opportunity to work." Complaint, Exhibit B. The Court cannot and does not find that "it can be said with positive assurance

that the contract is not susceptible to the arbitrator's interpretation," United Food, 889 F.2d at 947.

Accordingly, the Court finds no basis to overturn the arbitrator's award, and thus, GRANTS Defendants' Motion for Summary Judgment and DENIES Plaintiff's Cross-Motion for Summary Judgment.

IT IS SO ORDERED THIS 16th DAY OF DECEMBER, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DEC 17 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

OKLAHOMA FIXTURE COMPANY,)
)
Plaintiff,)
)
vs.) Case No. 96-C-216-B
)
UNITED BROTHERHOOD OF)
CARPENTERS AND JOINERS OF AMERICA,)
AFL-CIO, LOCAL NO. 943, and)
MARY SHIRLEY,)
)
Defendants.)

ENTERED ON DOCKET
DEC 18 1996

JUDGMENT

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment and denying Plaintiff's Cross-Motion for Summary Judgment, the Court hereby enters judgment in favor of Defendants United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local No. 943, and Mary Shirley, and against Plaintiff Oklahoma Fixture Company. Costs may be awarded upon proper application.

Dated, this 17th day of December, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

(10)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALLSTATE INSURANCE COMPANY, an Illinois corporation,	)	
Plaintiff,	)	
v.	)	**No. 96-CV-587B**
MICHAEL PARSONS, an individual, and CHRISTINA STILLION, an individual,	)	
Defendants.	)	

ORDER OF DISMISSAL WITHOUT PREJUDICE OF DEFENDANT, CHRISTINA STILLION

Now on this 17th day of Dec, 1996, comes on to be heard the Stipulation of Dismissal Without Prejudice of the parties, Allstate Insurance Company, and the Defendant, Christina Stillion. After considering said stipulation, it is the order of this court that the Defendant, Christina Stillion, is hereby dismissed from this action, without prejudice.

IT IS SO ORDERED THIS 17th day of Dec, 1996.

The Honorable Judge Thomas R. Brett

(10)

53003211.96P

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLARISSE TOWSLEE,

Plaintiff,

vs.

CIRCLE K STORES INC., a Texas Corporation,

Defendant.

Case No. 96C 284B

STIPULATION FOR DISMISSAL

COME now the Plaintiff, Clarisse Towslee, by and through her attorney, Brian E. Duke of the firm of White, Hack & Duke, and the Defendant, Circle K Stores, Inc., by and through its attorneys, Rainey, Ross, Rice & Binns, and ask this Court to dismiss this matter with prejudice, each party to bear its own costs and attorney's fees.

Dated this 25 day of Nov., 1996.

Clarisse Towslee
Clarisse Towslee

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Brian E. Duke OBA No. 14710
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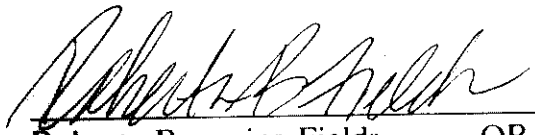

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Attorneys for Circle K Stores, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD B. CRAY, EDWARD H. HAWES, JULIANA R. JURDEN, JAMES R. MALONE, LESLIE RAEMDONCK, LORETTA D. RISS, ROBERT B. RISS, LAURA R. SCHREIER, LOUISE R. WELLS and KEITH WEBER,

Plaintiffs,

v.

DELOITTE HASKINS & SELLS and DELOITTE & TOUCHE,

Defendants.

Case No. 90-C-682-E

DEC 17 1996

STIPULATION AND ORDER
OF DISMISSAL WITH PREJUDICE
AMONG LESS THAN ALL PARTIES

IT IS HEREBY STIPULATED AND AGREED, by and among Plaintiff James R. Malone and Defendants Deloitte Haskins & Sells and Deloitte and Touche, and Deloitte & Touche LLP (collectively "Deloitte") by their duly authorized counsel, as follows:

1. The claims of Plaintiff James R. Malone in this action, including all claims asserted in the Complaint and the First Amended Complaint, and all claims which were, might, could or should have been asserted therein by James R. Malone shall be and hereby are withdrawn, discharged, released, dismissed and discontinued as against each and all of the defendants, with

prejudice and without costs, with each party to bear its own attorneys' fees and costs.

2. Any and all claims, including but not limited to claims for contribution or indemnification, however denominated, which have been, might have been, could have been or could be asserted by James R. Malone against Deloitte which relate to, or which are in any way based upon or arise from or are in any way connected with the claims asserted in the Complaint or the First Amended Complaint in this action are hereby extinguished, discharged, satisfied, barred and forever unenforceable, whether such claims arise out of federal or state law and whether based upon principles of tort or contract or on any statute or body of law whatsoever and the filing of such claims is hereby enjoined.

3. Any and all claims, including but not limited to counterclaims, however denominated, which have been, might have been, could have been or could be asserted by Deloitte against James R. Malone which relate to, or in any way based upon or arise from or are in any way connected with the claims asserted in the Complaint or the First Amended Complaint in this action are hereby extinguished, discharged, satisfied, barred and forever unenforceable, whether such claims arise out of federal or state law and whether based upon principles of tort or contract or on any statute or body of law whatsoever and the filing of such claims is hereby enjoined.

4. Each of the parties to this Stipulation and Order submits to the jurisdiction of this Court for purposes of the enforcement of this Stipulation and Order; any action to enforce this Stipulation and Order must be brought in this Court.

5. Neither this Stipulation and Order nor the fact of its execution, nor the settlement agreement nor any of the negotiations or proceedings related thereto, nor any action taken to carry out or enforce the Stipulation and Order shall be construed as, or be deemed to be evidence of, an admission or concession on the part of Deloitte of any fault, liability, or wrongdoing whatsoever, or of any damages having been incurred by James R. Malone. Deloitte has denied each and all of the claims and allegations asserted by James R. Malone in the Complaint and the First Amended Complaint filed in this action, and expressly deny any liability, fault or wrongdoing arising out of or relating to any of the conduct alleged in the Complaint or the First Amended Complaint.

6. This Stipulation and Order shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns, and any corporation, partnership or other entity into or with which any party hereto may merge, consolidate or reorganize. No party hereto is an infant, incompetent person for whom a committee has been appointed or conservatee and no person not a party has an

interest in the subject matter of the action. This Stipulation and Order may be filed without further notice to any party.

7. This dismissal effects only those claims and counterclaims in this action by James R. Malone against Deloitte and by Deloitte against James R. Malone. All other claims and counterclaims in this action, including the claims of plaintiffs Richard B. Cray, Edward D. Hawes, Juilana R. Jurden, Leslie Raemdonck, Loretta D. Riss, Robert B. Riss, Laura R. Schrier, Louise R. Wells and Keith Weber against Deloitte, and the counterclaims of Deloitte against those plaintiffs are not satisfied, discharged or dismissed and may be prosecuted and defended to conclusion.

8. Pursuant to Rule 54(b), the Court hereby certifies that there is no just reason for delay in the entry of Final Judgment on this Order. The Clerk of the Court shall enter a Final Judgment upon this Order, in accordance with Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: June 30, 1996

STUART, BIOLCHINI, TURNER & GIVRAY

By _____
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By _____
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Attorneys for Deloitte Haskins & Sells and Deloitte & Touche LLP

SO ORDERED

12/16/96

_____
J.S.C.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD LEE CAGLE,

Petitioner,

vs.

RITA MAXWELL,

Respondent.

No. 96-CV-966-H

ORDER OF TRANSFER

Before the court are Petitioner's motion for leave to proceed in forma pauperis and an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Upon review of the petition, it has come to the court's attention that Petitioner was convicted in Wagoner County, Oklahoma, which is located within the territorial jurisdiction of the Eastern District of Oklahoma. Therefore, in the furtherance of justice, this matter may be more appropriately addressed in that district.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's application for a writ of habeas corpus is **transferred** to the Eastern District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

The Clerk shall MAIL Petitioner and the Office of the Oklahoma Attorney General a copy of the petition in this case.

IT IS SO ORDERED this 12th day of December, 1996.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BUSINESS MENS' ASSURANCE COMPANY OF AMERICA, a Missouri corporation,

Plaintiff,

v.

MARTIN E. O'BOYLE, a citizen of Florida,

Defendant.

No. 96-CV-217-H

ADMINISTRATIVE CLOSING ORDER

On December 12, 1996, the Court entered an order dismissing this action with prejudice "except for representations, warranties, and agreements which survive."

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that further litigation in this Court is necessary.

IT IS SO ORDERED.

This 12TH day of December, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 12 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA, a Missouri corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 96-C-0217H
MARTIN E. O'BOYLE, a citizen of Florida,	)	
Defendant.	)	

DEC 17 1996

ORDER DISMISSING THIS ACTION WITH PREJUDICE EXCEPT FOR REPRESENTATIONS, WARRANTIES, AND AGREEMENTS WHICH SURVIVE

WHEREAS, the parties have filed a Joint Motion to Dismiss this Action With Prejudice petitioning the Court, pursuant to Paragraph No. 14 of the Confidential Settlement Agreement entered into between the parties on September 25, 1996, to dismiss this action with prejudice, except for the representations, warranties, and agreements set forth therein which shall survive, and the Court finds that the Motion should be sustained and this action should, therefore, be dismissed with prejudice, except for the representations, warranties, and agreements set forth therein which survive.

NOW, THEREFORE, BE IT ORDERED, ADJUDGED AND DECREED by the Court that this action be and the same is hereby and by these presents dismissed with

prejudice, except for the representations, warranties, and agreements set forth therein which survive.

Dated this 12th day of ~~November~~ December, 1996.

Sven Erik Holmes
United States District Judge

APPROVED:

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Attorney for Plaintiff

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Attorney for Defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DAVID LESLIE BROWN, JR.,

Petitioner,

vs.

DENISE SPEARS,

Respondent.

No. 96-CV-70-H

DEC 17 1996

JUDGMENT

In accord with the Order denying Petitioner's application for a writ of habeas corpus, the Court hereby **enters judgment** in favor of Respondent and against the Petitioner David Leslie Brown, Jr.

SO ORDERED THIS 16TH day of December, 1996.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID LESLIE BROWN, JR.,

Petitioner,

vs.

DENISE SPEARS,

Respondent.

No. 96-CV-70-H

DEC 17 1996

FILED

DEC 12 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court for consideration is Petitioner's pro se application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Docket #1.) Petitioner challenges his convictions on double jeopardy grounds. Also before the Court are Respondent's response and Petitioner's reply. As more fully set out below, the Court denies Petitioner's application for a writ of habeas corpus.

On March 15 and 16, 1993, Petitioner was tried by a jury and convicted of Robbery by Force (Count I) and Assault with a Dangerous Weapon (Count II). The trial court sentenced Petitioner to five years of imprisonment in Count I and two years of imprisonment in Count II.

At trial, the victim testified that she was walking along the street when Petitioner pulled up, opened the passenger door of his car, and asked her if she wanted a ride. When the victim, declined, Petitioner snatched her purse. The victim then jumped in the car and started wrestling with Petitioner in an attempt to retrieve her purse. Petitioner then reached under his car seat, pulled out a bread knife and said, "Lady you better get off, I

mean it bitch, you better stop." The victim got out of the car and the appellant left with her purse. (Trial tr. at 112-117.)

The Court of Criminal Appeals affirmed Petitioner's conviction and sentence by unpublished opinion on April 28, 1995. Judge Lane concurred in part and dissented in part. He concluded that "the State ha[d] taken this crime, broken it down into two component parts and used each part as the basis for [the] filing of separate charges. I believe this to be error. I would affirm the robbery conviction but reverse the assault with a dangerous weapon." Brown v. State, No. F92-966 (attached to Respondent's response).

In the instant action, Petitioner asserts he was convicted of two different crimes for the same criminal event in violation of the Double Jeopardy Clause.

The Double Jeopardy Clause "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). "This test emphasizes the elements of the two crimes. `If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" Brown v. Ohio, 432 U.S. 161, 166 (1977)

(quoted case omitted).

In the instant case, the crimes of robbery by force and assault with a dangerous weapon are distinct and separate crimes. Robbery by force is defined as follows:

> Robbery is a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

21 O.S. § 791.

Assault with a dangerous weapon instead is defined as follows:

> Every person who, with intent to do bodily harm and without justifiable or excusable cause, commits any assault . . . upon the person of another with any sharp or dangerous weapon . . . with intent to injury any person . . . is guilty of a felony punishable by imprisonment in the penitentiary not exceeding ten (10) years, or by imprisonment in a county jail not exceeding one (1) year.

21 O.S. § 645.

Robbery by force and assault with a dangerous weapon require proof of facts which the other does not. Assault with a dangerous weapon requires the use of a dangerous weapon, whereas robbery by force may be accomplished by any degree of force, or by threats. See Trevino v. State, 737 P.2d 575 (Okla. Crim. App. 1987). Moreover, only Robbery by force requires the taking and carrying away of personal property.

In his Reply, Petitioner asserts the decision of the Court of Criminal Appeals in Hale v. State, 888 P.2d 1027 (Okla. Crim. App. 1995), precludes the application of the Blockburger test to this case. In Hale, the court addressed the applicability of

Okla. Stat. tit. 21, § 11 which provides that the same act or omission cannot be punished pursuant to more than one statute. The court in Hale held that "[s]ection 11 complements double jeopardy, and only where § 11 does not apply need this Court engage in traditional double jeopardy analysis."

In federal habeas proceedings, this Court entertains a petition "only on the ground that [the state prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254; see Pulley v Harris, 465 U.S. 37, 41 (1984). Section 11 is essentially a state double jeopardy statute. Therefore, whether the Court of Criminal Appeal misinterpreted such section in Petitioner's direct appeal is a matter of state law and not actionable in this habeas proceeding.

Accordingly, the Court finds that Petitioner is not entitled to habeas relief on his double jeopardy claim and the petition for a writ of habeas corpus (Docket #1) is hereby DENIED.

SO ORDERED THIS 12TH day of DECEMBER, 1996.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 12/17/96

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EDDIE M. PITTSER,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,[1]

Defendant.

Case No: 95-C-402-W

JUDGMENT

Judgment is entered in favor of the defendant, Shirley S. Chater, Commissioner of Social Security, in accordance with this court's Order filed December 16, 1996.

Dated this 16th day of December, 1996.

JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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ENTERED ON DOCKET

DATE 12/17/96

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EDDIE M. PITTSER,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 95-C-402-W

FILED

DEC 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Leslie S. Hauger, Jr. (the "ALJ"), which summaries are incorporated herein by reference.

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[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.[3] He found that, subsequent to April 1, 1987, and prior to May 18, 1993, claimant had the residual functional capacity to perform less than the full range of sedentary work to the extent that he was unable to engage in substantial gainful activity and was therefore disabled. However, he found that claimant experienced medical improvement by May 18, 1993, and after that date could

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[2]Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3]The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

perform substantial work related activities. Beginning on May 18, 1993, he found that claimant had the residual functional capacity to perform sedentary work of an unskilled nature, subject to not lifting or carrying over five pounds and little stooping or bending. He concluded that claimant's impairments and residual functional capacity precluded him from performing his past relevant work, but that there existed occupations in the regional economy in significant numbers that he could perform regardless of his impairments commencing May 18, 1993, through the date of the decision. Having determined that there were jobs in the national economy that claimant could perform commencing on May 18, 1993, the ALJ concluded that he was disabled from April 1, 1987 to May 18, 1993 under the Social Security Act, but after May 18, 1993 he was not disabled.

Claimant now appeals the denial of benefits after May 18, 1993 and asserts alleged errors by the ALJ:

(1) The ALJ erred in using the grids to conclude that claimant could engage in sedentary work after May 18, 1993, because he suffers pain and can only stand for five minutes, sit for thirty minutes, lift five pounds, and walk for five minutes.

(2) The ALJ failed to give reasons for his conclusion that claimant's testimony concerning his pain was not credible.

(3) The ALJ's hypothetical questions to the vocational expert were improper.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant filed his claim for disability on July 10, 1991, claiming he had been unable to work since April of 1987 because of back pain and surgeries (TR 113-118). Dr. Gordon Skinner saw him on April 20, 1987 and reported that he had been hurt on the job on April 2, 1987, while lifting a generator (TR 147). He injured his left shoulder and neck and re-injured his back (TR 147). The doctor's examination showed decreased cervical and left shoulder motion, edema of the left shoulder and Trapezius muscle, alternating pain and numbness of the left upper extremity, and pain in the lumbar area, right hip and right leg with decreased left and right lumbar flexion and decreased lumbar extension (TR 147). The doctor concluded that claimant was temporarily totally disabled from the injuries sustained on the job in that his occupation was a very demanding one. (TR 147).

He was treated by a chiropractor for several months and then was seen by Dr. David Hicks at Orthopedic Specialists of Tulsa, Inc. from December 30, 1987 through August 19, 1991 (TR 157-166). He was given Feldene, Flexeril, Parafon Forte, Robaxin, heat, massage, injection and ultrasound treatments, and given exercise instructions and physical therapy (TR 163-166). On May 3, 1988, a CT scan of his lumbar spine showed:

> bilateral spondylolysis at L5, with considerable degenerative sclerotic change at the right spondylotic defect. There is a 1st degree L5-S1 spondylolisthesis. There is slight narrowing of the nerve root foramina at L5-S1 bilaterally, more pronounced on the right. There is no evidence of disc herniation. There is no evidence of spinal stenosis above the L5 level. There is some calcification in the ligamentum flavum at the upper aspect of L4 but this is exaggerated by partial volume averaging on the axial views. There is slight scattered degenerative changes of the facet joints particularly at L4-L5 and L5-S1.

(TR 169).

On July 11, 1988, a neural arch laminectomy of L-5 with decompression of nerve roots and a bilateral fusion at L5-S1 with a right iliac bone graft was done by Dr. Anthony Billings (TR 163, 183-194). Claimant continued to see Dr. Billings and x-rays done on October 16, 1989 showed that the fusion was incomplete or broken (TR 172-173). On January 5, 1990, Dr. Billings stated that claimant had been temporarily totally disabled since June 29, 1988 and would remain so for an undetermined period of time. (TR 170).

Claimant continued to see Dr. Hicks, complaining of pain, and the doctor recommended that he wear a chair back brace for a month (TR 160). The doctor reported on February 28,1990, that claimant had "done dramatically better using his brace." (TR 160). However, a myelogram was done on April 10, 1990 and a lumbar laminectomy was done to repair his pseudoarthrosis bilaterally at L5-S1 with a left iliac bone graft and insertion of an EBI bone stimulator (TR 159, 203-231). By May 11, 1990, claimant had "good relief of his pre-op pain" and he was wearing his brace (TR 159). On October 17, 1990, his fusion appeared healed and he was doing "quite well." (TR 158). The EBI bone stimulator was removed on October 23, 1990 (TR 158, 232). In December of 1990, he participated in the CHART work hardening program and was "coming along quite nicely." (TR 158).

Claimant's doctor reported that he gave claimant no new prescriptions on January 11, 1991 (TR 158). He received prescriptions for tylenol in April, May, June, and July of 1991 (TR 157-158). Finally, on August 19, 1991, Dr. Hicks stated:

> Mr. Pittser continues to complain of occasional back pain. Today there is no significant motor or reflex deficit in either lower extremity. He has mild diminished ability to perceive pin prick over the big toe of his left foot. There is no clonus. Babinski's were plantar bilaterally. Good pulses were felt in both feet. With respect to his lumbar spine, he can forward flex 40 degrees. He extends 4 degrees, bends to the right 22 degrees, and bends to the left 19 degrees . . . . He has a solid fusion, L5-S1. Based upon my evaluation and his participation in CHART, Mr. Pittser is not going to be able to return to the job in which he was previously employed. I would recommend he undergo a program of aptitude testing, job retraining and job rehabilitation.

(TR 157). He found that claimant had a 28% partial permanent impairment to the body as a whole for workers' compensation purposes.

Claimant had another laminectomy and fusion in March of 1992 (TR 242-272). In June of 1992, he was admitted to Laureate Psychiatric Clinic and Hospital for treatment of the "uncontrolled use of narcotics, along with cocaine, benzodiazepines, and alcohol." (TR 292). He "entered diligently into hospital treatment. He was detoxified safely. He became an energetic and enthusiastic part of the treatment community. He worked through some early volatility of his feelings and practiced self-hypnosis with exquisite concentration and attentiveness." (TR 292). When he was released after two weeks, he was alert, oriented, and free of psychosis, and had intact concentration, memory functions, and judgment (TR 293). He was given an excellent prognosis for working a successful recovery program (TR 293).

Claimant's doctor, R. Clio Robertson, saw him during the next year and prescribed medications for his pain (TR 237-241). On March 25, 1993, Dr. Robertson found that he had intermittent throbbing back pain aggravated by bending, stooping, and standing and radiation down the posterior thighs to the knees but not distal to

the knees (TR 236). The doctor stated that he was not able to work at manual labor, because any time he stretched his back his pain was markedly aggravated. (TR 236). The doctor noted that x-rays demonstrated a solid fusion at the L4-5 level, but a persistent pseudarthrosis at the lumbosacral level. (TR 236). It is significant that Dr. Robertson concluded that claimant could work:

> At this stage I feel the patient has achieved maximum medical improvement with medial treatment. I do not feel further attempts at repairing this pseudarthrosis would be helpful since I feel removal of the fractured screws would destroy the purchase of a new internal fixation device in the sacrum. Therefore, I will arrive at an impairment rating and dismiss the patient from active treatment. I do not feel he will ever be able to get back to an occupation which requires manual stress to his back; therefore, I have recommended vocational rehabilitational training to allow him to get into an occupation that does not apply stress to his back.

(TR 236) (emphasis added).

Two months later, on May 17, 1993, Dr. Robertson examined claimant, noted that he had back pain radiating to both legs, tenderness in his back, and restricted lumbar motion, and once again concluded that claimant could work: "I still feel the patient is unable to be involved in any type of manual labor, stressing his back, and therefore recommend vocational rehabilitation training in order to allow him to get into an occupation that does not apply stress to his back. He does have a pseudoarthrosis at the LS level." (TR 235) (emphasis added). He found that claimant had "a permanent partial impairment of 37 percent of the whole man as a result of injury sustained to his back in November of 1987." (TR 235).

At a hearing on June 15, 1994, claimant testified that he could only stand for five minutes, sit for thirty minutes, lift five pounds, and walk for five minutes (TR 372). He claimed he did nothing to help around the house or in the yard. (TR 371).

There is no merit to claimant's first contention that the ALJ erred in using the grids to conclude that claimant could work after May 18, 1993 in spite of his pain and activity restrictions. The medical-vocational guidelines ("grids") were developed by the Social Security Administration and relate a claimant's age, education and job experience with his ability to engage in work in the national economy at various levels of exertion.

The court in Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988) found that:

> Automatic application of the grids is appropriate only where a claimant's residual functional capacity (RFC) and other characteristics (age, work experience, education) precisely match a grid category . . . . RFC is primarily a measure of exertional capacity, i.e., strength. Residual capacity, however, sometimes is curtailed by nonexertional limitations, such as postural or sensory limitations. Where such is the case, the grids may not be applied mechanically but may serve only as a framework to aid in the determination of whether sufficient jobs remain within a claimant's RFC range (sedentary, light, medium, heavy, and very heavy).

See also, Thompson v. Sullivan, 987 F.2d 1482, 1492 (10th Cir. 1993).

To determine whether a claimant's pain is disabling, "the Secretary is entitled to examine the medical record to evaluate a claimant's credibility. Moreover, a claimant's subjective complaint of pain is by itself insufficient to establish disability." Brown v. Bowen, 801 F.2d 361, 363 (10th Cir. 1986) (quoting Dumas v. Schweiker,

712 F.2d 1545, 1552 (2nd Cir. 1983)). The medical records must be consistent with the nonmedical testimony as to the severity of pain. "To establish disabling pain without the explicit confirmation of treating physicians may be difficult. Nonetheless, the claimant is entitled to have his nonmedical objective and subjective testimony of pain evaluated by the ALJ and weighed alongside the medical evidence." Huston, 838 F.2d at 1131.

The ALJ clearly stated that he considered the grids and "the testimony of the qualified vocational expert" to determine that there were jobs in the regional economy in significant numbers that claimant could perform after May 18, 1993 (TR 26). He also focused on the May 17, 1993 examination by Dr. Robertson which showed that claimant had improved, and that he could perform work-related activities that would not stress his back (TR 22). There was no mechanical application of the grids by the ALJ.

The ALJ also considered claimant's allegations of pain and complied with the court's admonition in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987):

> [W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The

> decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

The ALJ considered these factors and, after the consideration, found claimant's allegations of disabling pain not fully credible (TR 23).

There is also no merit to claimant's second contention that the ALJ failed to give reasons for his conclusion concerning claimant's pain, as required by Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995). The court in Kepler noted that credibility determinations are the special province of the finder of fact and should not be upset when supported by substantial evidence. Id. at 391. However, such findings as to credibility should be closely and affirmatively linked to substantial evidence. Id. The court noted that an ALJ should articulate specific reasons for questioning a claimant's credibility where subjective pain testimony is critical, and failure to make such findings regarding critical testimony will totally undermine a finding of substantial evidence that a claimant is not disabled. Id. The court remanded the case to allow the ALJ to provide "the link between the evidence and credibility determination." Id.

The ALJ did specifically link his decision regarding claimant's pain testimony to substantial evidence. He stated:

> I have considered claimant's allegations of pain and limitations . . . and find that they are not fully credible . . . . I have considered the entire record, including the testimony, claimant's subjective complaints, prior work record and observation of treating and examining physicians regarding such matters as: the nature, location, onset, duration, frequency, radiation, and intensity of any pain; precipitating and aggravating factors (ie: movement, activity, environmental conditions, etc.); type, dosage, effectiveness, and adverse side-effects of any pain or other medication; treatment, other than medication, for relief of pain;

> functional restrictions; and claimant's daily activities. All of the above, and other items, have been duly considered, whether or not specifically mentioned in this decision. After such consideration, the primary reasons that I find claimant's allegations not to be fully credible are, but not limited to, the lack of objective findings by claimant's treating physicians, the lack of objective findings by examining physicians, the lack of medication for severe pain, the lack of frequent treatments for pain, the lack of discomfort shown by claimant at the hearing.

(TR 23) (emphasis added).

It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey v. Bowen, 816 F.2d 508, 517 (10th Cir. 1987).

Finally, there is no merit to claimant's contention that the ALJ's hypothetical question was improper. The question assumed that claimant had "the residual functional capacity to perform sedentary work as defined in the Regulations limited, however, to not lifting or carrying over five pounds and little stooping or bending." (TR 381). The ALJ admitted that the number of jobs such a person could do "would not be considered significant" and "there would be substantial reductions due to the limitations of five pounds." (TR 381).

The vocational expert did not, as claimant's counsel contends, find that claimant could do all office helper jobs, which are classified in the Dictionary of Occupational Titles as light work. She testified that there were approximately 3000 such jobs at the sedentary level and the limitation of lifting five pounds would reduce that number to only 1000 (TR 381-382). She also found that claimant could do the

job of a telephone solicitor, and there were approximately 1,800 of those jobs in the state. (TR 382).

It is true that, when asked by claimant's counsel "if somebody with the problems of only being able to sit for a half an hour at the most would not be able to do them?", she responded: "That's correct." (TR 383). However, "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). In forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley V. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). The ALJ did not find substantial evidence to support the inclusion in his hypothetical question of claimant's claims that she could only stand and walk for five minutes, sit for thirty minutes, and lift five pounds, so these did not need to be included in forming a hypothetical.

The decision of the ALJ is supported by substantial evidence and is a correct application of the pertinent regulations. The decision is affirmed.

Dated this 16th day of December, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RODNEY LEE MORGAN,

Defendant.

Case No. 89-CR-118-B
96-CV-763-B

ORDER

Before the Court is Defendant Rodney Lee Morgan's ("Morgan") 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct the Sentence this Court imposed following his federal convictions for Armed Bank Robbery and Aiding and Abetting (Count One), and Possession of a Firearm During a Crime of Violence (Count Two), filed August 20, 1996. Morgan challenges his sentence by raising two interrelated issues. First, Morgan argues it was improper for the sentencing Court to impose one (1) criminal history point under United States Sentencing Guidelines § 4A1.2 (c)(1) ("U.S.S.G.") for his 1986 conviction for Possession of Marijuana in Tulsa Municipal Court, Case No. 464854A. Morgan entered a plea of *nolo contendere* to the Possession of Marijuana charge and was assessed a three hundred dollar ($300.00) fine and forty dollars ($40.00) in court costs.

Morgan next claims ineffective assistance of counsel, as an objection to the addition of the criminal history point was not raised at sentencing or on direct appeal.

After careful review of the record and applicable legal authorities, the Court finds the imposition of one (1) criminal history point for Morgan's 1986 Possession of Marijuana conviction was improper. This renders Morgan's ineffective assistance of counsel claim moot. Morgan's Motion to Vacate, Set Aside, or Correct the Sentence is hereby **GRANTED**.

I. BACKGROUND

An excellent exposition of the facts relevant to this case can be found at United States v. Morgan, 936 F.2d 1561, 1564-65 (10th Cir. 1991), *cert. denied*, 502 U.S. 1102, 112 S.Ct. 1190, 117 L.Ed.2d 431 (1992), wherein Morgan's federal convictions were affirmed.

II. ANALYSIS

A. Statute of Limitations

Although not raised by the parties, the Court first considers whether the one-year statute of limitations added by § 105 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) ("Act"), bars Morgan from bringing the instant § 2255 motion. 28 U.S.C. § 2255, as revised by § 105 of the Act, precludes the filing of a § 2255 motion more than one year after conviction. 28 U.S.C. § 2255 (as amended by 110 Stat. 1214, 1220 (Apr. 24, 1996)). Such is the case here. Prior to this amendment, a party could bring a § 2255 motion at any time. *Id.*

The Act does not specifically state the one-year statute of limitations is to be retroactively applied to non-capital habeas cases. The Court thus looks to whether the application of the amended statute to Morgan's appeal "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf v. USI Film Prods., 511 U.S. 244, ---, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994). In other words, if the amended statute attaches "new legal consequences to events completed before its enactment," it is not applied retroactively. *Id.* at ---, 114 S.Ct. at 1505.

The Tenth Circuit Court of Appeals has expressly declined to make the new one-year statute of limitations retroactive when a § 2255 motion is filed prior to the effective date of the Act and more

than one year after conviction, but decided after the effective date of the Act. *See* United States v. Lopez, 100 F.3d 113, 116 (10th Cir. 1996). In Lopez, the Court agreed with the Seventh Circuit Court of Appeals that retroactive application of the one-year statute of limitations period to bring a § 2255 motion would be inconsistent with Landgraf. *Id.* at 117 (*citing* Herrera v. United States, 96 F.3d 1010, 1011-12 (7th Cir. 1996)).

The specific issue of whether the one-year statute of limitations added by § 105 of the Act applies retroactively to § 2255 motions filed after the effective date of the Act and more than one year after conviction appears open in the Tenth Circuit. The Seventh Circuit discussed whether § 105 of the Act should be retroactive in Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996). Believing the imposition of the one-year statute of limitations attaches "new legal consequences" to a party's decision to file a § 2255 motion, Judge Easterbrook wrote;

> Courts treat a reduction in the statute of limitations as a rule for new cases only. And although no decision of the Supreme Court addresses the question directly, we do not doubt that the Court would give a plaintiff who files after the enactment a reasonable post-amendment time to get litigation underway.
>
> . . .
>
> Section 2244(d) is short enough that the "reasonable time" after April 24, 1996, and the one-year statutory period coalesce; reliance interests lead us to conclude that no collateral attack filed by April 23, 1997, may be dismissed under § 2244(d) and the parallel provision added to 28 U.S.C. § 2255 by § 105 of the 1996 Act.

Id. at 866.

While not controlling authority, further support that the Act's one-year statute of limitations should not be applied retroactively comes from Smith v. United States, --- F.Supp. ---, 1996 WL 664778 (D.Colo. Oct. 29, 1996) (§ 2255 motion filed after, but within one year of, the effective date of the Act and more than one year after conviction is not time-barred). This Court is of the opinion a § 2255 motion filed prior to April 23, 1997 is not time-barred, irrespective of the date of

conviction.[1]

B. Imposition of One (1) Criminal History Point

Morgan challenges the eighty-seven (87) month sentence imposed pursuant to his conviction on Count One (Armed Bank Robbery and Aiding and Abetting). Morgan's primary contention centers around paragraph 28 of his Presentence Report ("PSR") which assigned one (1) criminal history point to his 1986 conviction for Possession of Marijuana in Tulsa Municipal Court. It is Morgan's position that U.S.S.G. § 4A1.2 (c)(1) does not allow the sentencing court to add one (1) criminal history point for his marijuana conviction in municipal court because he did not receive probation or jail time, and the municipal violation was not similar to the instant offense. The PSR assigned Morgan a criminal history score of seven (7) which placed him in criminal history category IV. Without the additional point for his municipal court conviction, Morgan's criminal history score would be six (6), thus, placing him in criminal history category III. At Morgan's offense level of 23, criminal history category III has a range of 57-71 months of imprisonment, while criminal history category IV has a range of 70-87 months of imprisonment. *See* U.S.S.G. Sentencing Table (Nov. 1989). Morgan received the maximum sentence under criminal history category IV, offense level 23.

Because this issue could properly have been raised on direct appeal, the Court raises *sua sponte* the doctrine of procedural default. United States v. Cook, 997 F.2d 1312, 1320 (10th Cir. 1993) (federal court can raise procedural bar *sua sponte*). It is well settled that "[s]ection 2255 motions are not available to test the legality of matters which should have been raised on direct appeal." United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994) (citation omitted). Consequently, a defendant's failure to present an issue on direct criminal appeal bars him from raising

---

[1]For contrary holdings see United States v. Bazemore, 929 F.Supp. 1567 (S.D.Ga. 1996) and Harold v. United States, 932 F.Supp. 705 (D.Md. 1996).

that issue in his § 2255 motion, unless he can show cause excusing his procedural default and actual prejudice resulting from the errors of which he complains, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed. Cook, 997 F.2d at 1320.

As discussed below, Morgan can show that a fundamental miscarriage of justice will occur if his claim is not addressed; that his term of imprisonment on Count One will exceed that which he is obligated to serve under the sentencing guidelines in effect at the time of sentencing. Thus, the procedural bar will not preclude Morgan from raising the instant challenge to the imposition of one (1) criminal history point for his municipal court conviction.

The Court now turns to the merits of Morgan's claim. A defendant is sentenced under the sentencing guidelines in effect on the date of sentencing. United States v. Saucedo, 950 F.2d 1508 (10th Cir. 1991). Morgan was sentenced on February 12, 1990. Thus, the United States Sentencing Commission's Guidelines Manual, effective November 1, 1989, contains the guidelines applicable in this case.

The United States ("Government") contends U.S.S.G. § 4A1.1 (c) allows one criminal history point to be added for Morgan's 1986 marijuana conviction. U.S.S.G. § 4A1.1 states, in relevant part:

> Criminal History Category
>
> The total points from items (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.
>
> (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
>
> (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
>
> (c) Add 1 point for each prior sentence not included in (a) or (b), up to a total of 4 points for this item.

Prior sentence means "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense. U.S.S.G. § 4A1.2 (a)(1) (Nov. 1989). If our analysis were to end at this point, as the Government's does, it is clear the subject criminal history point could be properly counted as part of Morgan's criminal history. However, U.S.S.G. § 4A1.2 (c) (Nov. 1989) states:

> (c) Sentences Counted and Excluded
>
> Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:
>
> (1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:
>
> Contempt of court
> Disorderly conduct or disturbing the peace
> Driving without a license or with a revoked or suspended license
> False information to a police officer
> Fish and game violations
> Gambling
> Hindering or failure to obey a police officer
> Leaving the scene of an accident
> *Local ordinance violations*
> Non-support
> Prostitution
> Resisting arrest
> Trespassing

(emphasis added).

Morgan contends that since his marijuana conviction was in municipal court, it was a misdemeanor violation of a local ordinance. Further, the sentence imposed pursuant to his *nolo contendere* plea was a fine and payment of court costs, and the possession of marijuana is not similar to the instant armed bank robbery offense. Thus, the marijuana conviction should not have been

counted as part of his criminal history.

Strikingly similar to the instant case is United States v. Mondaine, 956 F.2d 939 (10th Cir. 1992). In Mondaine, the issue was whether defendant's municipal court conviction for aggravated assault is a counted offense under U.S.S.G. § 4A1.2 (c)(1) (Nov. 1988) when the only form of punishment imposed was a fine. The District Court held the municipal conviction could be considered part of Mondaine's criminal history as it "mirrored a state misdemeanor law." *Id.* at 942. On September 10, 1989, the District Court counted the municipal court conviction, thereby increasing Mondaine's criminal history points from six (6) to seven (7), and sentenced him under criminal history category IV. Without the additional criminal history point, Mondaine's criminal history category would be III.

On appeal, the Tenth Circuit held Mondaine was improperly sentenced as the municipal court conviction should not have been considered part of his criminal history. In so doing, the Court analyzed an amendment to the "Local ordinance violations" offense of U.S.S.G. § 4A1.2 (c)(1). The amendment, effective November 1, 1990 (post-sentencing), counts as a prior offense convictions for local ordinance violations that are also criminal offenses under state law. Prior to the amendment, *no* conviction for a local ordinance violation was counted as a prior offense under U.S.S.G. § 4A1.2 (c)(1) unless the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or the prior offense was similar to the instant offense. The Tenth Circuit found the amendment made a substantive change in the law, rather than clarifying preexisting law, as was the Sentencing Commission's intent.[2] Thus, to consider Mondaine's municipal court conviction as part of his criminal history would violate the ***ex post facto*** clause of the Constitution. Mondaine at

[2]*See* U.S.S.G. App.C, at C.197 (Nov. 1990).

942.

Such is the case here. U.S.S.G. § 4A1.2 (c)(1) was identical under the Guidelines applicable to Morgan (November 1, 1989) and the Guidelines applicable to Mondaine (November 1, 1988). Morgan's criminal history was pegged at seven (7), including the point for his 1986 municipal court conviction. At the time of sentencing, the amendment to U.S.S.G. § 4A1.2 (c)(1), Local ordinance violations, was not in effect. Thus, under the November 1, 1989 Guidelines, Morgan's municipal court conviction should not have been considered part of his criminal history. The addition of the criminal history point was improper and must be corrected.

III. CONCLUSION

For the foregoing reasons, Morgan's Motion to Vacate, Set Aside, or Correct Sentence is hereby GRANTED.

Further, the case is hereby set for resentencing on 30th day of Dec., 1996, at 9:30 A.m. at 224 S. Boulder, Tulsa, Oklahoma, Courtroom 2.

The United States Probation Office is hereby directed to file an Amended Presentence Investigation Report consistent with this Court's Order on or before Friday, December 20, 1996.

IT IS SO ORDERED THIS 13th day of Dec., 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

SRL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALLSTATE INSURANCE COMPANY, an Illinois corporation,	)	
Plaintiff,	)	
v.	)	**No. 96-CV-587B**
MICHAEL PARSONS, an individual, and CHRISTINA STILLION, an individual,	)	
Defendants.	)	

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Allstate Insurance Company, by and through counsel of record, and the Defendant, Christina Stillion, by and through counsel of record, and hereby stipulate to the dismissal of Ms. Stillion, without prejudice, from the above-noted action.

Christina Stillion

Cull Bevins
Attorney for Christina Stillion

Galen L. Brittingham
Allstate Insurance Company

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OKJ

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ENTERED ON DOCKET

DATE 12/17/96

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILFORD C. HARRIS,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner Social Security Administration,

Defendant.

Case No. 96-C-11-J

ORDER[1/]

Plaintiff filed a Motion to Dismiss Without Prejudice on December 4, 1996. [Doc. No. 13-1]. On December 9, 1996, the parties filed a "Stipulation of Dismissal" [Doc. No. 14-1] stating that the parties agree, upon approval of the Court, that Plaintiff's case shall be dismissed. Fed. R. Civ. P. 41(a)(1)(ii) permits a Plaintiff to voluntarily dismiss an action, without order of the court, by filing a stipulation of dismissal signed by all parties. However, because Plaintiff's stipulation requests that the Court enter an Order, the Court hereby **GRANTS** Plaintiff's Motion to Dismiss Without Prejudice [Doc. No. 13-1] pursuant to Fed. R. Civ. P. 41(a)(2).

Plaintiff's action is hereby **DISMISSED** without prejudice.

Dated this 16th day of December 1996.

Sam A. Joyner
United States Magistrate Judge

[1/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

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12-17-96

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TEDDY J. INMAN,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,[1]

Defendant.

Case No: 95-C-445-K

FILED
DEC 16 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

Judgment is entered in favor of the Plaintiff, Teddy J. Inman, in accordance with this court's Order filed December 6, 1996.

Dated this 13th day of December, 1996.

TERRY C. KERN
UNITE STATES DISTRICT JUDGE

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PIERRE BUTLER,

Plaintiff,

vs.

UNITED PARCEL SERVICE, INC.

Defendant.

No. 96-C-422-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 13 day of December, 1996.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

14

DATE 12/17/96

FILED

DEC 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAY THOMPSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 96-C-0039-J**
	)	
SHIRLEY S. CHATER, Commissioner, Social Security Administration,	)	
	)	
Defendant.	)	

ORDER

On September 27, 1996, this Court granted the Commissioner's Motion for Remand pursuant to sentence 4 of § 205(g) of the Social Security Act, 42 U.S.C. § 05(g), and entered Judgment in favor of the plaintiff.

Pursuant to plaintiff's application for attorneys fees pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412(d), filed on October 28, 1996, the parties have stipulated that an award in the amount of $2,232.00 for attorney fees (no costs) for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees under the Equal Access To Justice Act in the amount of $2,232.00. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 16th day of December 1996.

S/Sam A. Joyner
U.S. Magistrate

SAM A. JOYNER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILBERT LEE ROBERSON,

Plaintiff,

vs.

TULSA JUNIOR COLLEGE,

Defendant.

Case No. 96-C-182-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 16th day of December, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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12-17-96

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 13 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ST. PAUL SURPLUS LINES INSURANCE COMPANY,	)	
Plaintiff,	)	
-vs-	)	No. CIV-95-C-716-K
ROBINOWITZ OIL COMPANY, Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

Come now the parties to this action, plaintiff St. Paul Surplus Lines Insurance Company and defendant Robinowitz Oil Company, and pursuant to Fed.R.Civ.P. 41(a)(1), stipulate to the dismissal of this action with prejudice because the parties have reached a full and complete settlment of this action.

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STEVE L. LAWSON OBA #12369
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525 South Main, Suite 1400
Tulsa, OK 74102 4409
(918)
ATTORNEY FOR DEFENDANT,
Robinowitz Oil Company

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

James D. Young, an individual,

Plaintiff,

v.

Town of Kiefer, an incorporated town; and James Poulin, in his personal capacity,

Defendants.

No. 96-CV-1035-B

ORDER OF DISMISSAL WITH PREJUDICE

This case comes on for hearing on the Stipulation for Dismissal with Prejudice (Stipulation) of the plaintiff. The court being fully advised in the premises and for good cause shown finds that this case should be dismissed against these defendants pursuant to the Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the plaintiff's action against defendants, Town of Kiefer and James Poulin, is dismissed with prejudice toward the bringing of any future action.

UNITED STATES DISTRICT JUDGE

APPROVED:

E. Scott Pruitt
Cityplex Towers, Suite 4550
2448 East 81st St.
Tulsa, OK 74137-4237
Attorney for Plaintiff

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 13 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff

v.

ROYCE D. BARNETT,

Defendant.

Civil Action No. 96CV-767B

ENTERED ON DOCKET

DATE DEC 16 1996

DEFAULT JUDGMENT

This matter comes on for consideration this 13th day of December, 1996, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Royce D. Barnett, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Royce D. Barnett, was served with Summons and Complaint on October 17, 1996. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Royce D. Barnett, for the principal amount of $2,643.67, plus accrued interest of $254.02, plus interest thereafter at the rate of 9 percent per annum until judgment, a surcharge of 10% of the

(6)

amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of $120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.45 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918)581-7463

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CORNELIUS DEAN FINLEY)
)
Plaintiff,)
)
vs.) Case No. 96-C-1121-B
)
CITY OF TULSA, and RONALD PALMER, in his official capacity as Chief of Police for the City of Tulsa)
)

Defendants.

REPORT & RECOMMENDATION

On December 5, 1996, Plaintiff filed an Application for a Preliminary Injunction. [Doc. No. 1-1]. By minute order dated December 6, 1996, the District Court referred Plaintiff's Application for a Preliminary Injunction to the undersigned Magistrate Judge for report and recommendation.

On December 10, 1996, this Court heard argument by the parties and held an evidentiary hearing with respect to the Application for a Preliminary Injunction. At the hearing, Plaintiff Cornelius Dean Finley appeared by and through attorney Lewis Barber, Jr. Defendants the City of Tulsa and Ronald Palmer appeared by and through attorney Michael C. Romig.

The Court has heard the arguments of counsel and the evidence presented by the parties, reviewed the case file, and considered the briefs and exhibits filed by the parties. The Court recommends that the District Court deny Plaintiff's Application for a Preliminary Injunction [Doc. No. 1-1] pursuant to Fed. R. Civ. P. 65a, because

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Plaintiff will not suffer irreparable harm and any damages which the Plaintiff sustains can be compensated by money damages. Minnesota Association of Nurse Anesthetists v. Unity Hospital, 59 F.3d 80, 82 (8th Cir. 1995); Marxe v. C.W. Jackson, 833 F.2d 1121, 1127 (3rd Cir. 1987).

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **DENY** Plaintiff's Application for Preliminary Injunction [Doc. No. 1-1].

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 10th day of December 1996.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LAURA JOANN DRYE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 95-C-1142-H
	)	
MCI TELECOMMUNICATIONS CORPORATION,	)	
	)	
Defendant.	)	

ORDER

Upon the Joint Stipulation for Dismissal With Prejudice filed herein by the parties, it is hereby,

ORDERED, that this case is dismissed with prejudice, each party to bear her or its own costs, expenses and attorneys' fees.

DATED: This 12TH day of ~~November,~~ DECEMBER 1996.

United States District Judge

Submitted by:

Leslie C. Rinn
2121 S. Columbia, Suite 710
Tulsa, OK 74114-3521
(918) 742-4486

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DUSTIN D. MARANG, an individual, Plaintiff, vs. CIGNA GROUP INSURANCE, a division of CIGNA HOLDINGS, INC., a Delaware corporation; ALLIED CORPORATION, the Plan Administrator; ALLIED-SIGNAL GROUP BENEFITS PROGRAM, the Plan; and ALLIED-SIGNAL, INC., a Delaware Corporation, Defendants.	§	Case No. 95-C-724H

ORDER OF DISMISSAL WITH PREJUDICE

Upon the Stipulation of the parties, this action is hereby dismissed with prejudice, each party to bear its own costs and attorney's fees.

IT IS SO ORDERED this 12th day of DECEMBER, 1996.

UNITED STATES DISTRICT JUDGE

SMP/alt:Cigna/Marang/Order.Dis

12-16-96

FILED

DEC 13 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 96-C-417-K
	)	
GARRY McCALL,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

This matter was referred for an evidentiary hearing and report and recommendation on September 25, 1996. An evidentiary hearing was conducted on October 28, 1996, addressing the issue of whether the defendant was denied his right to effective assistance of counsel relating to an appeal. The Magistrate Judge makes Findings of Fact and draws Conclusions of Law as follows:

Findings of Fact

Any Conclusion of Law that might be properly characterized as a Finding of Fact is incorporated herein.

The court finds:

1. Garry McCall ("McCall") is twenty-nine (29) years old, has thirty-six (36) hours of junior college credit, and can read and write English.

2. On September 9, 1994, McCall was charged, with others, in a seventeen count criminal complaint filed in the Northern District of Oklahoma. On October 7, 1994, they were charged in a twenty-three count indictment with devising and executing a scheme to defraud elderly victims and banks utilizing telephone

solicitations.

3. McCall was financially unable to engage counsel, and the court appointed Richard Couch ("Couch") to represent him.

4. Couch has been a licensed attorney in Oklahoma since 1983, has worked for the Federal Public Defender's Office, and has been a member of the Criminal Justice Act Panel since leaving that office approximately five (5) years ago. He is an experienced criminal defense attorney, regularly serving as appointed counsel on behalf of hundreds of indigent defendants, and testified that he has never had a claim of ineffective assistance asserted against him before.

5. On December 8, 1994, a change of plea hearing was held. McCall advised the court that he understood that, by changing his plea to guilty, he was waiving certain constitutional rights, including his right to appeal the conviction, and the court advised him that he had a right to appeal any sentence imposed.

6. On December 9, 1994, McCall entered a plea of guilty to counts eight and twenty-three of the indictment, pursuant to a plea agreement. McCall agreed, for relevant conduct purposes, that the total amount of the fraud charged and uncharged for conduct named in counts one through twenty-three of the indictment was approximately $35,000.00, but did not exceed $40,000.00.

7. McCall, through his attorney, filed numerous objections to the presentence report, to which the Probation Office filed an addendum in response. After an evidentiary hearing on May 19, 1995, McCall was sentenced to a term of seventy-one months of imprisonment as to count twenty-three and sixty months as to count

eight, to run concurrently.

8. McCall signed the petition to enter a plea of guilty and the plea agreement, and he testified that he understood and intended to waive certain rights, but not his right to appeal any sentence imposed. The petition to enter a plea of guilty and the plea agreement did not indicate that McCall had waived that right. Couch did not recall discussing with McCall his appeal rights before the petition to enter a plea of guilty or the plea agreement were executed or before the sentencing hearing itself.

9. At the May 19, 1995, sentencing hearing, McCall was advised by the court that he had ten days in which to appeal his sentence and that an attorney to represent him on an appeal would be appointed if he could not afford to engage counsel independently. He stated that he understood he had a right to appeal the sentence.

10. At no time prior to sentencing, during sentencing, or immediately after the sentencing hearing did McCall advise the court or his counsel that he did not wish to appeal his sentence or that he wished to waive his right to appeal.

11. McCall testified that, immediately after his sentence was pronounced, he and Couch sat down and had a brief conversation in Judge Kern's courtroom. McCall told Couch he would like to appeal the sentence, because Judge Kern had found he played a supervisory role in the crimes and enhanced the sentence as a result. Couch responded that this would just be "spinning our wheels," but agreed to visit McCall later to discuss the matter.

12. On May 23, 1995, Couch visited McCall in the Tulsa County Jail for a

short time. Couch presented McCall with a "Notice to Defense Counsel," which stated in part:

> I, Garry Duane McCall, after having been advised by my attorney, Richard W. Couch, of my right to appeal the judgment and sentence of the United States District Court for the Northern District of Oklahoma rendered on May 19, 1995 to the United States Court of Appeals for the Tenth Circuit, do hereby notify my attorney that . . . .

These words were followed by two choices, one expressing a wish to appeal and one expressing a wish to waive an appeal. McCall did not request Couch to prepare this Notice or have any knowledge of it until it was presented to him.

13. McCall placed an "X" next to the statement "I do not wish to appeal to the United States Court of Appeals for the Tenth Circuit," and signed and dated the Notice. The testimony of the parties conflicted as to the conversation following the signing of the Notice. McCall testified he was not advised of the advantages and disadvantages of an appeal, what specific grounds might have been meritorious for appeal, or what the probabilities were of success on appeal on any specific grounds. McCall testified that he told Couch he wanted to appeal the enhancement. Couch testified that they discussed the fact that an appeal on McCall's supervisory role might open other issues to be appealed by the government and might lead to review of the court's reduction in the offense level based on the amount of loss, which had been favorable for McCall.

14. McCall testified that he was confused as to the distinction between the underlying conviction and the sentence and what specific appellate rights he was waiving when he signed the Notice. The court finds that McCall voluntarily,

knowingly, and intelligently checked the "I do not wish to appeal" block and then signed the Notice to Defense Counsel after discussing the possibilities of a successful appeal with Couch. He knew that, by checking the box he checked and not the other box, he was waiving his right to appeal both the judgment and sentence he received in this case.

15. A judgment against McCall was entered on May 25, 1995. Couch did not advise McCall that it had been entered, did not provide him with a copy of it, and did not explain that, if McCall wished to appeal, he must do so within ten days from the entry of the judgment by filing a notice of appeal. The court finds that Couch's reliance on the notice signed by McCall and verbal discussions with him was a reasonable basis for his subsequent failure to discuss the entry of judgment with him. McCall was able to read and write English, and it was reasonable for Couch to believe that he both read and understood the words and meanings of the words in the Notice to Defense Counsel and the rights that he was waiving, when he checked the first block instead of the second block on it, either of which could have been checked.

16. The handwritten notes of Couch reflect four attempts by McCall to contact Couch by collect telephone calls during June. The first call was made on June 5, 1995, and Couch noted: "see him today, if possible." The second call was on June 7, 1995, and Couch wrote: "I told him I would work on today. Check with court clerk on when he can get paid." The third call was on June 8, 1995, and no notes regarding the conversation were made. The final call was on June 16, 1995, and Couch refused the call.

17. Couch also made a handwritten note which reflected that the judgment was entered on May 25, 1995, and the notice of appeal was due by June 5, 1995. He did not prepare a notice of appeal or confer with McCall during the ten day period within which to appeal. The court finds that Couch had no reason to believe that the defendant had subsequently decided to appeal his sentence. No letter was sent by McCall to Couch, and no telephone message was left during the next ten days, requesting a notice of appeal be filed. In fact, a telephone conversation between the two on June 7, 1995, was concerned with when McCall could get his bond money. When Couch visited McCall on June 9, 1995, McCall made no inquiry about an appeal.

18. McCall received a copy of the notice he signed, along with several documents from Couch, in response to a September 20, 1995, letter requesting documents needed to assist him in the preparation of a § 2255 motion.

19. On May 10, 1996, McCall filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 in this court. In his motion, he asserted that his trial counsel was ineffective for failing to file a direct appeal challenging a finding in the presentence report that he played a supervisory role in the crimes, resulting in a four-level increase in his guidelines total offense level. The government responded, and the court issued an order finding counsel was effective at sentencing, upholding the guideline level decision, and referring the matter for an evidentiary hearing before the Magistrate Judge.

Conclusions of Law

Any Finding of Fact which is more appropriately characterized as a Conclusion of Law is incorporated herein.

The court draws Conclusions of Law as follows:

1. An indigent defendant in a criminal trial has the constitutional right to the assistance of counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). This right to assistance of counsel extends to the defendant's direct appeal. Evitts v. Lucey, 469 U.S. 387, 396 (1985). Specifically, in the "hiatus between the termination of trial and the beginning of an appeal," a defendant has a constitutional right to counsel. Baker v. Kaiser, 929 F.2d 1495, 1499 (10th Cir. 1991) (quoting Nelson v. Peyton, 415 F.2d 1154, 1157 (4th Cir. 1969), cert. denied, 397 U.S. 1007 (1970)).

2. Where, as here, a defendant claims that counsel was ineffective for failing to perfect an appeal, he must satisfy only the first prong of the test announced by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984) -- namely, that counsel's performance was deficient. Romero v. Tansy, 46 F.3d 1024, 1030 (10th Cir. 1995), cert. denied, ___ U.S. ___, 115 S.Ct. 2591, 132 L.Ed.2d 839 (1995); Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990). The second prong of Strickland, requiring a showing of prejudice, is presumed. Romero, 46 F.3d at 1030. In addition, the merits of arguments that the defense may have raised on appeal are entirely irrelevant. Id.; Abels, 913 F.2d at 823.

3. The Tenth Circuit has held that "a defendant is denied effective assistance of counsel if he asks his lawyer to perfect an appeal and the lawyer fails to do so by

failing to file a brief, a statement of appeal, or otherwise." Id. (citations omitted). Counsel appointed to represent indigent persons "must advise them of their right to appeal and perfect an appeal if that is the client's wish." United States v. Winterhalder, 724 F.2d 109, 111 (10th Cir. 1983). Counsel must perfect an appeal even if counsel concludes that such appeal would be frivolous. Id.

4. To satisfy the Sixth Amendment's guarantee to effective counsel, defense counsel must (1) explain the advantages and disadvantages of an appeal, (2) advise the defendant as to meritorious grounds for an appeal, and (3) inquire whether a defendant wishes to appeal. Romero, 46 F.3d at 1031; United States v. Youngblood, 14 F.3d 38, 40 (10th Cir. 1994); Baker, 929 F.2d at 1499. The Tenth Circuit has recognized that, in light of these duties, "a defendant does not need to express to counsel his intent to appeal for counsel to be constitutionally obligated to perfect the defendant's appeal." Romero, 46 F.3d at 1031; Baker, 929 F.2d at 1500. Likewise, merely advising a defendant of his right to appeal does not satisfy the defendant's right to counsel. Hardiman v. Reynolds, 971 F.2d 500, 506 (10th Cir. 1992).

5. Defense counsel has these obligations concerning a defendant's appellate rights until the defendant executes a "voluntary, knowing and intelligent waiver of his right to counsel on appeal." Romero, 46 F.3d at 1031. If counsel fails in one of these duties, it is a violation of the defendant's constitutional right to effective assistance of counsel. Abels, 913 F.2d at 823; Baker, 929 F.2d at 1499-1500.

6. A defendant's waiver of his right to assistance of counsel to perfect an appeal must be voluntary, knowing, and intelligent, and the defendant must clearly

and unequivocally assert his intention to represent himself. United States v. Baker, 84 F.3d 1263, 1264 (10th Cir. 1996). The court must "indulge in every reasonable presumption against waiver." Baker, 929 F.2d at 1500 (citing Brewer v. Williams, 430 U.S. 387, 404 (1977)). The same standard applies to a defendant's right to waive an appeal. United States v. Broughton-Jones, 71 F.3d 1143, 1146 (4th Cir. 1995).

7. Whether there has been a "knowing and intelligent" waiver of the right to waive an appeal depends on "the particular facts and circumstances surrounding [the] case, including the background, experience and conduct of the accused." Id. (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The waiver is only "knowing" or "informed" if the defendant fully understands the consequences of the waiver. United States v. Ready, 82 F.3d 551, 557 (2d Cir. 1996).

8. Any doubts surrounding a waiver of counsel must be resolved in the defendant's favor. United States v. Williamson, 806 F.2d 216, 220 (10th Cir. 1986). The remedy for ineffective assistance of counsel causing a failure to file a direct appeal is to resentence the defendant to allow the defendant to timely file a notice of appeal. United States v. Moore, 83 F.3d 1231, 1233 (10th Cir. 1996).

9. McCall has failed to show that Couch was ineffective for failing to perfect an appeal and exhibited a deficient performance under Strickland v. Washington. McCall is therefore entitled to no relief.

Recommendation

Based upon the finding that McCall's attorney was not ineffective in failing to file a direct appeal on his behalf, it is recommended that the court deny McCall's Motion to Vacate, Set Aside, or Correct Sentence, brought pursuant to 28 U.S.C. § 2255.

Dated this 13th day of January, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Mccall.ff

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WILBERT LEE ROBERSON,

Plaintiff,

v.

TULSA JUNIOR COLLEGE,

Defendant.

No. 96-CV-0182BU

FILED
DEC 13 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DEC 16 1996

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), Fed. R. Civ. P., this case having been amicably settled, the parties stipulate to its dismissal with prejudice to refiling.

Joe L. White
1718 W. Broadway
Collinsville, OK 74021

ATTORNEY FOR PLAINTIFF

Thomas L. Vogt, OBA #10995
Jones, Givens, Gotcher & Bogan
15 East Fifth Street, Suite 3800
Tulsa, Oklahoma 74103-4309
(918) 581-8200

ATTORNEYS FOR DEFENDANT TULSA JUNIOR COLLEGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PETER J. McMAHON,

Plaintiff,

vs.

STANLEY GLANZ,

Defendant.

No. 94-C-1198-K

ORDER

On November 22, 1996, the Court overruled Plaintiff's Objection to the Magistrate Judge's Order and directed Plaintiff to pay the $120.00 filing fee on or before December 12, 1996, or this case would be dismissed. On December 9, 1996, Plaintiff informed the Court that he is unable to pay the filing fee and has no objection to the Court entering an order of dismissal at the present time.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is hereby DISMISSED for failure to pay the filing fee.

SO ORDERED THIS 11th day of December, 1996.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

86

12-16-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.)
)
ESTATE OF RONALD L. McMUNN,)
Deceased, George S. Stoia,)
Administrator; SHIRLEY ANN McMUNN,)
individually and as personal)
representative of the Estate of)
Ronald L. McMunn; STEPHEN LEE)
McMUNN; LINDA KAY MEAKES;)
MARC McMUNN; BRAD MURRAY;)
LORI O'DELL; BOARD OF COUNTY)
COMMISSIONERS OF WASHINGTON)
COUNTY,)
)
Defendants.)

Civil No. 96-CV-601-K

FILED
DEC 12 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT AGAINST THE ESTATE OF
RONALD L. McMUNN, DECEASED, GEORGE S. STOIA, ADMINISTRATOR

The Court, having considered the United States' motion for entry of default judgment against defendant, Estate of Ronald L. McMunn, Deceased, George S. Stoia, Administrator, hereby enters judgment as follows:

1. Judgment is entered against the Estate of Ronald L. McMunn, Deceased, George S. Stoia, Administrator and in favor of the United States for the outstanding 1985 federal income taxes, accrued interest, and penalties according to law, assessed against Ronald L. McMunn in the amount of $25,280.95, plus interest accruing after October 31, 1996.

2. The Estate of Ronald L. McMunn, Deceased, George S. Stoia, Administrator, has no legal or equitable interest in the real property located in Washington County, Oklahoma and described below:

Lot Four (4), Block One (1), Lannom Addition,
including a 10 foot strip on west side of Lot
4, Block 1, Bartlesville, Washington County, Oklahoma.

Submitted for entry by:

STEPHEN P. KRANZ
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044

IT IS SO ORDERED this 11th day of December, 1996.

HONORABLE TERRY C. KERN, CHIEF JUDGE
United States District Court
Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

REROOF AMERICA, et al.,

Plaintiffs,

vs.

UNITED STRUCTURES OF AMERICA, INC., et al.,

Defendants.

No. 96-C-388-K

O R D E R

Before the Court is the motion of the defendant Commercial Siding & Maintenance (CSM) to dismiss for improper venue. Plaintiffs filed this action on May 7, 1996, alleging infringement of patents for adjustable roofing systems. The complaint alleges CSM is an Ohio corporation having its principal place of business in Ohio. CSM resells reroofing materials that it buys from manufacturers such as defendant United Structures of America.

CSM argues venue is improper pursuant to 28 U.S.C. §1400(b), which provides: "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." CSM has submitted an affidavit by its president, stating CSM is not licensed to do business in Oklahoma, and maintains no sales office, sales

representatives or distribution facilities within Oklahoma. Finally, the affidavit asserts CSM has made no sales within the Northern District of Oklahoma. CSM has sold reroofing products in Oklahoma on only two occasions, and those involved projects at Altus Air Force Base and Tinker Air Force Base, both in the Western District of Oklahoma.

In response, plaintiffs do not contend CSM has committed acts of infringement in the Northern District of Oklahoma or has a regular and established place of business here, but focuses upon the "residence" test of §1400(b). Plaintiffs correctly note that, applying the general corporate venue statute of 28 U.S.C. §1391(c), the court in VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed.Cir.1990), cert. denied, 499 U.S. 922 (1991), held "venue in a patent infringement case includes any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced." Id. at 1583. Plaintiffs construe this to mean that because (as CSM does not contest) personal jurisdiction exists over CSM in the state of Oklahoma, venue is appropriate in the Northern District.

The Court disagrees. In Plastic Films, Inc. v. Poly Pak America, Inc., 764 F. Supp. 1238, 1240 (W.D.Mich.1991), the court noted: "If a state has more than one judicial district, a corporate defendant is deemed to reside in only those districts where its contacts would be sufficient to subject it to personal jurisdiction if those districts were separate states." This interpretation flows directly from the second sentence of 28 U.S.C.

§1391(c). The same interpretation appears in Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc., 869 F.Supp. 152, 157 (S.D.N.Y.1994)(personal jurisdiction over defendant in the Eastern District of New York does not confer personal jurisdiction over defendant in the Southern District of New York). In the VE Holding case, the Federal Circuit stated "the first test for venue under § 1400(b). . . is whether the defendant was subject to personal jurisdiction in the district of suit at the time the action was commenced." 917 F.2d at 1584 (emphasis added).

Plaintiffs have failed to show defendant CSM "resides" in the Northern District of Oklahoma, or that venue is otherwise appropriate pursuant to 28 U.S.C. §1400(b).

It is the Order of the Court that the motion of the defendant Commercial Siding & Maintenance to dismiss for improper venue (#25) is hereby GRANTED.

IT IS SO ORDERED THIS 11th DAY OF DECEMBER, 1996

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

DATE 12-16-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 12 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REROOF AMERICA, et al.,

Plaintiffs,

vs.

UNITED STRUCTURES OF AMERICA, INC., et al.,

Defendants.

No. 96-C-388-K

O R D E R

On November 18, 1996, plaintiffs filed a "dismissal with prejudice" as to defendant Oklahoma Industrial Construction, Inc. (OIC). Because OIC had filed an answer, dismissal may only be by order of the Court, pursuant to Rule 41(a) F.R.Cv.P. No response or request for other conditions has been filed by any other party.

It is the Order of the Court that defendant Oklahoma Industrial Construction, Inc. is hereby dismissed with prejudice, each party to bear its own costs and expenses.

IT IS SO ORDERED THIS 11th DAY OF DECEMBER, 1996

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

60

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 12-16-96

RENARD ELVIS NELSON,

Plaintiff,

vs.

TULSA COUNTY, OKLAHOMA, and THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Defendants.

No. 95-C-371-K
(Base file)

FILED

DEC 12 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On November 4, 1996 Magistrate Judge Joyner entered his Report and Recommendation regarding defendants' motion to dismiss. The Magistrate Judge recommended the motion be granted. No objection has been filed to the Report and Recommendation and the ten-day time limit of Rule 72(b) F.R.Cv.P. has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it.

It is the Order of the Court that the motion of the defendant to dismiss is hereby GRANTED.

ORDERED this 11th day of December, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

40

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JO ETTA DONEESA RAMSEY,

Petitioner,

vs.

NEVILLE O. MASSIE,

Respondent.

No. 96-CV-852-B

ORDER

Before the Court for consideration is Respondent's motion to dismiss. (Docket #3.) Respondent contends Petitioner is challenging the same conviction which she previously challenged in a 1989 petition before the Honorable James O. Ellison in Case No. 89-cv-1030-E. Therefore, Respondent moves to dismiss this action for failing to obtain authorization from the Tenth Circuit Court of Appeals in compliance with the Antiterrorism and Effective Death Penalty Act. Although Petitioner has not objected, it is clear from the record that she did not receive Respondent's motion as she is at a private prison in Texas. For the reasons set forth below, Petitioner's motion is transferred to the Tenth Circuit Court of Appeals.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted into law. P.L. 104-132, 110 Stat. 1214 (1996). Section 106 of the AEDPA added a gatekeeping mechanism for the filing of second or successive habeas petitions pursuant to 28 U.S.C. § 2254, requiring that such second or successive motion be approved by a three-judge panel of the

(4)

applicable circuit court. See Section 2244(3) as amended. Therefore, before filing the instant petition for a writ of habeas corpus, Petitioner should have obtained leave to do so from the Tenth Circuit Court of Appeals.

In Liriano v. United States, 95 F.3d 119 (2nd Cir. 1996), amended and superseded in part by Liriano v. United States, 1996 WL 580079 (2nd Cir. Aug. 28, 1996), the Second Circuit held that when a second or successive petition is erroneously filed in the district court without the permission of the requisite three-judge panel, the petition should be transferred to the Circuit Court if it is in the interest of justice to do so. Id. at 122. The Second Circuit relied upon 28 U.S.C. § 1631 for the authority to accomplish this result, § 1631 states:

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed . . ., and the action . . . shall proceed as if it had been filed in . . . the court to which it is transferred on the date upon which it was actually filed in . . . the court from which it is transferred.

As noted by the Second Circuit, most situations in which a second or successive petition is filed in a district court will reflect ignorance of the new statute rather than an attempt to evade its terms. Liriano, 95 F.3d at 122.

Although the Tenth Circuit has not had an opportunity to address the above situation, this Court believes the Tenth Circuit would adopt the approach set out in Liriano.

IT IS THEREFORE ORDERED that Respondent's motion to dismiss (Docket #3) is DENIED and the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is TRANSFERRED to the Tenth Circuit Court of Appeals. The Clerk shall MAIL a copy of the October 1, 1996 order and Respondent's motion to dismiss to Petitioner Jo Etta Doneesa Ramsey, #91513, Odessa Detention Center, 203 N. Grant, Odessa, TX 79761.

IT IS SO ORDERED this 12th day of Dec., 1996.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LVV INTERNATIONAL, INC., an Oklahoma Corporation, d/b/a Autographz,	
Plaintiff,	
vs.	**Case No. 96-C-345-BU**
LARRY MITCHELL,	
Defendant.	
vs.	
GREGORY JONES,	
Counterclaim Defendant.	

JOINT STIPULATION OF DISMISSAL AND ORDER OF DISMISSAL

The parties, LVV International, Inc. ("LVV"), Gregory Jones ("Jones") and Larry Mitchell ("Mitchell"), pursuant to FED. R. CIV. P. 41(a)1)(ii), by and through their respective undersigned counsel, having duly executed a Settlement Agreement and having stipulated as follows:

1. This court has jurisdiction of the parties hereto and of the subject matter hereof;

2. The parties have agreed to amicably resolve all issues raised in the litigation and therefore, all claims may be dismissed as follows:

(a) LVV agrees to dismiss that portion of the First Claim for Relief contained in LVV's First Amended and Supplemental Complaint filed herein on July 31, 1996 wherein LVV requested that the Court enter a declaratory judgment that U.S. Patent No. 5,534,100, entitled Portable Method and Apparatus for the Application of a Flock Material Graphic to a Fabric

surface, issued in the name of Larry Mitchell on July 9, 1996 (hereinafter the "Mitchell Patent") is invalid, said dismissal being without prejudice to being reasserted by LVV or Jones as a defense to any future allegations of patent infringement or, alternatively, being reasserted as an independent action seeking a declaratory judgment in regard to any future allegations of patent infringement;

(b) LVV agrees to dismiss with prejudice that portion of the First Claim for Relief contained in LVV's First Amended and Supplemental Complaint wherein LVV requested that the Court enter a declaratory judgment that the LVV's Autographz! System does not infringe the claims of the Mitchell Patent, such dismissal, however, being without prejudice as to processes that LVV and Jones may hereafter make, use, sell, or offer for sale which differ in some material respect from the LVV Autographz! System insofar as the claims of the Mitchell Patent are concerned. For purposes of the parties' stipulation, LVV's Autographz! System shall refer to the system sold and marketed by LVV after July 9, 1996, as described in the deposition testimony of Gregory Jones taken on October 23, 1996, and in various documents produced and other information provided by LVV and Jones pursuant to discovery in this action.

(c) Mitchell agrees to dismiss with prejudice the Seventh and Eighth Counterclaims contained in Mitchell's Answer to First Amended and Supplemental Complaint, Affirmative Defenses and Counterclaims filed herein on August 12, 1996, wherein Mitchell asserted claims for relief based upon allegations that LVV's Autographz! System infringed the Mitchell Patent, and sought relief damages and injunctive relief from LVV and Jones for Patent Infringement and Contributory Patent Infringement. Such dismissal shall, however, be without prejudice as to any claims for infringement which Mitchell may hereafter seek to assert regarding methods that LVV

and Jones may subsequently make, use, sell, or offer for sale which differ in some material respect from the LVV Autographz! System insofar as the claims of the Mitchell Patent are concerned.

(d) LVV, Jones, and Mitchell agree to dismiss with prejudice all claims for relief which either of them has asserted in this action not specifically addressed by the foregoing provisions.

3. The parties have entered into a Settlement Agreement, and agree to the entry of the attached order.

Respectfully submitted,

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Date. December 3, 1996

By: James W. Tilly
James W. Tilly
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ORDER OF DISMISSAL

THIS MATTER, having come before the Court upon the foregoing Stipulation, it is thereupon:

ORDERED AND ADJUDGED as follows:

1. The Stipulation of the parties as set forth above is hereby approved.

2. All claims are dismissed as set forth above.

3. The parties shall bear their own costs and attorney's fees incurred in connection with this action.

4. The Court shall retain jurisdiction to enforce the terms of the Settlement Agreement.

DONE AND ORDERED in Chambers, United States District Court for the Northern District of Oklahoma this 12th day of ~~November~~ Dec, 1996.

s/ MICHAEL BURRAGE

Hon. Michael Burrage
United States District Judge

Copies Furnished:

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOREN BEESLEY, SSN: 448-40-0315, Plaintiff, v. SHIRLEY S. CHATER, Commissioner of the Social Security Administration, Defendant.	)	CASE NO. 95-C-891-M

JUDGMENT

Judgment is hereby entered for **Plaintiff** and against Defendant. Dated this 11th day of Dec., 1996.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOREN BEESLEY
448-40-0315 Plaintiff,

vs.

SHIRLEY S. CHATER, [1] Commissioner Social Security Administration,
Defendant,

Case No. 95-C-891-M

ORDER

Plaintiff, Loren Beesley, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.[2] In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

As in most appeals of Social Security disability denial decisions, the parties presented their positions through the submission of briefs. The Court takes specific note of the abysmal quality of briefing on the Secretary's behalf. The Secretary's attorney apparently failed to notice that the record contains two ALJ decisions: one dated July 24, 1992, [R. 11-25], which was the subject of a previous appeal and

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[1] Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-297. However, this order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

[2] Plaintiff's June 21, 1991 application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held. By decision dated May 18, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on August 21, 1995. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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remand; and a second one dated May 18, 1995, [R. 215-222], which is the one relevant to the instant appeal. The brief filed on the Secretary's behalf cites to and defends the 1992 decision, which was reversed and remanded, rather than the 1995 decision at issue in this appeal. As a result, the Secretary's brief is replete with utterly nonsensical information when viewed in context of the remand, subsequent development of the record, second hearing, and decision. Worse, the attorney writing on the Secretary's behalf chose to include flippant remarks in the brief such as referring to the Plaintiff's evidence as "feeble" and his arguments as "absurd."

Further, the Secretary's brief contains no citations to the record in support of the Secretary's position, as required by the Court's scheduling order. In fact, there is no indication in the Secretary's brief that the author of that brief conducted any review of the record. The only record citations contained in Secretary's brief are to the 1992 decision. Such inattention and sloppy work does a disservice to the Secretary and hampers the Court in its resolution of the issues before it. Although it appears to the Court that the Secretary's brief was filed in violation of the duty of reasonable inquiry imposed by Fed.R.Civ.P. 11, the Court declines to issue the show cause order contemplated by Fed.R.Civ.P. 11(c)(1)(B) in the hope that the stern comments contained herein will suffice to deter future submission of such poor work product on the Secretary's behalf.

STANDARD OF REVIEW

The role of the court in reviewing the decision of the Secretary under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial

evidence and whether the decision contains a sufficient basis to determine that the Secretary has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its discretion for that of the Secretary. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has properly outlined the required sequential analysis. The Court incorporates that information into this order as the duplication of effort would serve no purpose.

DISCUSSION

Plaintiff protectively filed his application for disability benefits on June 19, 1991, alleging a December 7, 1990 onset date of disability. Plaintiff's application was denied. He pursued his claim through the administrative level, eventually appealing the denial to the district court. By Order dated August 1, 1994, the district court remanded the denial for further development of the record and analysis. [R. 228]. On remand a hearing was conducted on April 14, 1995 before Administrative Law Judge ("ALJ") Glen E. Michael. [R. 317-345]. The May 18, 1995 denial

decision which is the subject of this appeal was signed by Administrative Law Judge Stephen C. Calvarese for Judge Michael. The final paragraph of the decision states:

> Administrative Law Judge Glen E. Michael held the hearing in this case as required by Section 557(b) of Title 5, United States Code (5 U. S. C. § 557(b)). Judge Michael is deceased and this case has been assigned to the undersigned Administrative Law Judge for inspection of the entire record of the case and to sign this decision in the place and stead of Judge Michael in contemplation of the provisions of Section 554(d) of Title 5, United States Code (5 U. S. C. § 554(d)). I certify that this decision is exclusively the work product and complete decision of Administrative Law Judge Glen E. Michael, who alone considered all the evidence, both oral and written, and the contentions of the claimant and the Social Security Administration.

[R. 220-21].

Despite the certification by Judge Calvarese that the decision was "exclusively the work product" of Judge Michael and that his only role was to inspect the record and sign the decision in Judge Michael's stead, Plaintiff characterizes the decision as that of Judge Calvarese, [Dkt. 4, p. 2], and states:

> Plaintiff doubts ALJ Michael had an opportunity to review the transcript or the final Decision. No one knows if this opinion accurately reflects ALJ Michael's assessment of Plaintiff's credibility. Too much emphasis is placed upon credibility to allow another ALJ to review an opinion about a case he did not hear. The danger of undue prejudice mandates Plaintiff be granted another hearing.

The Court is not persuaded that the fact Judge Michael died before he signed the decision is alone reason to grant another hearing. The Court notes that Plaintiff cited no authority in support of this argument. Further, Plaintiff failed to point out a single

discrepancy between Judge Michael's account of the facts and the record. Plaintiff's reference to the "danger of undue prejudice" is not sufficient reason to remand the decision. Accordingly, the Court will proceed to examine Plaintiff's other allegations of error.

Plaintiff was 53 at the time of the hearing on remand. He has a high school education and has past relevant work as a lathe machinist, drill press machinist, pool servicer, and carpenter. He claims to be unable to work as a result of pain in his back, right hip, right leg, and left elbow. The ALJ determined that objective medical tests did not support Plaintiff's allegations of pain and limitation. He found that, although Plaintiff was unable to perform his past relevant work, he was capable of performing a full range of light work. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff challenges the ALJ's determination in several interrelated respects, arguing it is not supported by substantial evidence, erroneously relies on the grids, fails to take into account the medical evidence concerning Plaintiff's mental status, and that a proper hypothetical question was not posed to the vocational expert. For the reasons expressed below, the Court holds that the existing record and findings will not support the denial of benefits on the ALJ's stated rationale and, therefore the case must be reversed and remanded.

The Secretary bears the burden of proof at step five to establish that, in light of Plaintiff's residual functional capacity (RFC), age, education and work experience, he could still perform other jobs existing in significant numbers in the national economy. *Ragland v. Shalala*, 992 F.2d 1056, 1057 (10th Cir. 1993). The ALJ relied on the Medical-Vocational Guidelines ("Grids"), 20 C.F.R., Pt. 404, Subpt. P, App. 2, Table No. 2, Rule 202.15, to support the determination that Plaintiff is not disabled. It is well established that "[t]he grids should not be applied conclusively in a particular case ... unless the claimant could perform the full range of work required of [the pertinent RFC] category on a daily basis and unless the claimant possesses the physical capacities to perform most of the jobs in that range." *Ragland,* at 1058, quoting *Hargis v. Sullivan*, 945 F.2d 1482, 1490 (10th Cir.1991); *see also Trimiar v. Sullivan*, 966 F.2d 1326, 1332 (10th Cir.1992) (exclusive reliance on grid proper only if claimant's characteristics precisely match criteria of particular rule).

The Court must therefore assess the record to determine whether the Secretary presented substantial evidence demonstrating that notwithstanding his physical impairments and alleged pain, Plaintiff could perform the full range of light work and would qualify for most of the jobs falling within that RFC category. Absent such evidence, the Secretary cannot satisfy the burden at step five without producing expert vocational testimony or other similar evidence to establish the existence of significant work within the claimant's capabilities. See *Hargis* at 1491; *see also Trimiar*, 966 F.2d at 1328 n. 5.

The Court finds that the ALJ was not entitled to rely upon the Grids to establish the existence of jobs in the national economy which Plaintiff can perform because the record does not support the ALJ's finding that Plaintiff has the capacity to perform light work.

Plaintiff testified that he can: bend only enough to touch his knees; sit for 45 minutes; walk one-half block; stand 35 minutes; drive 30 minutes and lift 15 pounds. He also testified he must get up and walk 5 to 10 minutes every 35 minutes. [R. 327-35]. However, the ALJ reviewed the medical evidence and found "there is no objective evidence showing any significant abnormality which would be expected to cause pain to the degree alleged by claimant" [R. 218].

The medical record reflects that numerous tests were performed on Plaintiff, including: CT scan [R. 112, 258], myelogram [R. 125- 131], EMG [R. 250-252], and diskogram [R. 253-54], all of which failed to demonstrate an objective basis for Plaintiff's complaints of pain. Physical examination performed on May 14, 1992 by Dr. Farrar showed decreased range of motion in the lumbar spine but full range of motion in his hips, knees, ankles and feet with some muscle weakness and atrophy in the right leg. [R. 247-248]. Dr. Farrar examined Plaintiff again on June 17, 1994 and again found full range of motion in Plaintiff's legs, atrophy of the right leg (2 cm smaller than left); sensory loss and weakness in the left leg and reduced range of motion in the lumbar spine. [R. 287]. Plaintiff was also examined by consultative physician Michael Karathanos, M.D. on January 24, 1995. Dr. Karathanos found no neurological deficits, but diffuse weakness in Plaintiff's lower extremities due to pain,

not neurological weakness. He noted that Plaintiff did not exert his full strength during the examination. [R. 298-299]. Dr. Karathanos completed a "Medical Assessment of Ability to Perform Work-Related Activities" form which indicated that Plaintiff could sit one hour at a time, stand 30 minutes, and walk ten minutes. Of an 8 hour day he could sit a total of six hours, stand a total of one hour, and walk a total of 30 minutes. Lifting and carrying weight was limited to up to 5 pounds occasionally and 6-10 pounds infrequently. Use of Plaintiff's right foot for repetitive movements for pushing and pulling leg controls was limited, he was limited to infrequent bending and the assessment indicated he was not able to squat. [R. 300-301].

Social Security regulations define light work as "involv[ing] lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds." 20 C.F.R. § 404.1567(b). In addition, the regulations state:

> Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

Id. Since the ALJ found that Plaintiff "has the residual functional capacity to perform a full range of light work," the Court must determine whether substantial evidence supports that finding. It does not, as demonstrated by a comparison of the requirements of light work to the uncontradicted assessment performed by Dr. Karathanos.

To be considered capable of performing a full range of light work, Plaintiff must be able to *frequently* lift and carry up to 10 pounds. Dr. Karathanos indicated that Plaintiff could lift and carry 6-10 pounds *infrequently*. Light work involves a good deal of walking or standing. Dr. Karathanos indicated that Plaintiff could walk a total of 30 minutes and stand one hour out of an 8 hour day. When a job in the light work category involves sitting most of the time one must be able to perform pushing and pulling of leg and arm controls. Dr. Karathanos noted no problem with pushing and pulling of arm controls, but found that Plaintiff's ability to use his right leg for such work was limited. Dr. Karathanos' assessment is the only evidence, aside from Plaintiff's own testimony which addresses his ability to perform these specific work related activities. According to Dr. Karathanos' assessment, Plaintiff does not have the ability to do substantially all of the activities required of light work.

The Court notes that testimony of a vocational expert was produced and that the vocational expert testified as to the existence of at least one sedentary job (soldering machine tender) that would utilize Plaintiff's transferable skills, and a sedentary unskilled job (assembler). [R. 341]. However, there is nothing in the record relating these jobs to Plaintiff's physical and mental abilities. *Hargis v. Sullivan,* 945 F.2d 1482, 1492 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the Secretary's decision." The ALJ did not pose a hypothetical question to the vocational expert outlining any of Plaintiff's impairments. The vocational expert was only asked about the

transferability of Plaintiff's skills and about the existence of jobs which might utilize those skills. [R. 339-342]. According to *Hargis* the ALJ's decision which relies upon the vocational expert's testimony is not supported by substantial evidence. Therefore, the Secretary's decision cannot be sustained on the basis of the vocational expert's testimony.

The decision of the Secretary is REVERSED and the case REMANDED for further proceedings consistent with this order.

SO ORDERED this 11th day of December, 1996.

Frank H McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 96-CV-770-H**
	)	
ONE PARCEL OF REAL PROPERTY KNOWN AS: 725 NORTH GRANT SAND SPRINGS, OKLAHOMA AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON,	)	ENTERED ON DOCKET DATE DEC 12 1996
	)	
Defendant.	)	

FILED

DEC 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

COME NOW the Plaintiff, the United States of America, and Mary Kathryn Voss, the Claimant in the above-captioned civil action, and stipulate that this cause of action be dismissed, without prejudice and without any costs, and the defendant property, to-wit:

> Lot Twenty-eight (28) and the North Fifteen (15) feet of Lot Twenty-seven (27), Block Twenty-Five (25), OAK RIDGE ADDITION to the Town of Sand Springs, Tulsa County, Oklahoma, according to the recorded Plat thereof; a/k/a 725 North Grant, Sand Springs, Oklahoma;

which was seized and arrested by the United States Marshals service in this action, be, and it is, likewise, dismissed from the above-captioned civil action.

Respectfully submitted,

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United States Attorney

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MARY KATHRYN VOSS, Claimant, Pro-Se
3724 S. 55th W. Ave.
Tulsa, OK

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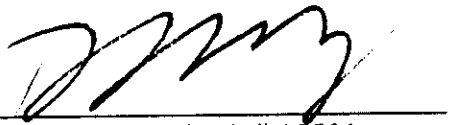
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY JANE PENNINGTON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 96CV-638H
	)	
WILLIAM MARSHALL PENNINGTON,	)	
	)	
Defendant.	)	

STIPULATION FOR DISMISSAL

Pursuant to Rule 41 (a), Federal Rules Of Civil Procedure, it is stipulated by and between the parties to the above entitled action, by their respective attorneys of record, that this action should be and is hereby dismissed without prejudice to either party, and that an order accordingly may be made and entered without further notice to either party.

NAYLOR, WILLIAMS & TRACY, INC.



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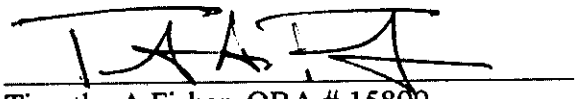

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CERTIFICATE OF MAILING

I hereby certify that a true, correct and complete copy of the above and foregoing STIPULATION FOR DISMISSAL was mailed on the ___ day of November, 1996, with sufficient postage prepaid thereon, to:

Timothy A Fisher
FLOWERS & FINLAYSON, P. C.
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Tulsa, Oklahoma 74104-5726

David A. Tracy

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOUBLE G'S INVESTMENTS,

Plaintiff,

vs.

KENTUCKY FRIED CHICKEN OF SOUTHERN CALIFORNIA, INC., a California corporation,

Defendant.

Case No. 96-CV-1049-B

ORDER

This Court finds that the Motion to Transfer of Defendant Kentucky Fried Chicken of Southern California, Inc. should be and is hereby GRANTED. This case is transferred to the United States District Court for the Western District of Oklahoma.

DATED: Dec 11th 1996

Thomas R. Brett
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

DWITT E. FLATT and MARILYN S. FLATT,

Plaintiffs,

v.

ARCO OIL AND GAS COMPANY, ATLANTIC RICHFIELD COMPANY, RDT PROPERTIES, INC., and TEXACO INC.,

Defendants.

Case No. 96-CV-654-B

ORDER

Upon the joint application of Plaintiffs, Dwitt E. Flatt and Marilyn S. Flatt, husband and wife and Defendants ARCO Oil & Gas Company, Atlantic Richfield Company and Texaco, Inc. and for good cause shown,

IT IS HEREBY ORDERED that the parties' Joint Application for Dismissal with Prejudice is granted by the Court. Accordingly, the Court hereby orders that this lawsuit is dismissed with prejudice to the refiling of claims asserted herein, as to the Defendants ARCO Oil and Gas Company, Atlantic Richfield Company and Texaco, Inc., with each party to bear their own costs and attorneys' fees. The Defendant RDT Properties, Inc. is not a party to the Application and is not dismissed from the lawsuit.

DATED this 11th day December, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

24805.08

(13)

12-12-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

REROOF AMERICA, INC., FABTEC, INC., and HAROLD SIMPSON, INC.

Plaintiffs,

v.

UNITED STRUCTURES OF AMERICA, INC., COMMERCIAL SIDING & MAINTENANCE CO., and OKLAHOMA INDUSTRIAL CONSTRUCTION, INC.,

Defendants,

FILED

DEC 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96C-388K

STIPULATION OF DISMISSAL

All parties to this action, hereby stipulate that Oklahoma Industrial Construction, Inc. may be dismissed with prejudice, each party to bear its own costs.

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ENTERED ON DOCKET

DATE 12/12/96

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM YAHOLA,
SS# 446-56-4186

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security Administration,

Defendant.

No. 95-C-1016-J

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 10 day of December 1996.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM YAHOLA,
SS# 446-56-4186

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security Administration,

Defendant.

No. 96-C-1016-J

ORDER[1/]

Plaintiff, William Yahola, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[2/] Plaintiff asserts error because (1) the ALJ considered only a portion of an exhibit, and (2) the Appeals Council ignored evidence which was submitted after the ALJ's decision. For the reasons discussed below, the Court affirms the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was hospitalized and treated for pulmonary tuberculosis in March 1991. [R. at 75]. On discharge, Plaintiff was cautioned not to work for one week and to wear a mask if he was required to go outside. Plaintiff's condition at the time of his

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1/ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

2/ Plaintiff filed an application for disability and supplemental security insurance benefits on November 13, 1992. [R. at 34]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Stephen C. Calvarese (hereafter, "ALJ") was held August 22, 1994. [R. at 153]. By order dated March 23, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 14]. Plaintiff appealed the ALJ's decision to the Appeals Council. On August 18, 1995, the Appeals Council denied Plaintiff's request for review. [R. at 3].

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discharge was "good." [R. at 75]. Plaintiff's hospital record additionally indicates that he has diabetes, and has had such a condition for ten years.

On July 22, 1992, Plaintiff was admitted for an infection in his great left toe. Plaintiff was 39 at the time of his admission. Plaintiff reported that while at work he had stepped on a roofing nail and successfully extracted the nail, but that his foot began causing him pain. [R. at 103]. On July 13, 1992, Plaintiff went to the Tulsa Indian Clinic, and his infection was treated with antibiotics. On July 22, 1992, he was admitted to the hospital due to swelling and blistering on his left toe. [R. at 88]. Although Plaintiff was on antibiotics, the condition of his toe worsened. On July 23, 1992, he underwent a debridement of the toe. However, because his toe did not heal, on July 27, his left toe was amputated. Plaintiff was discharged on July 27, 1992, with instructions to use crutches, to refrain from placing weight on his toe, and to return in one week. [R. at 88-90].

Plaintiff had several follow-up visits for the purpose of checking on the condition of his toe. By August 5, 1992, Plaintiff's doctor reported that Plaintiff's wound was clear and he was healing well. [R. at 114]. On January 27, 1993, Plaintiff's doctor's notes indicate that Plaintiff "may resume work but not as a roofer." [R. at 111].

Plaintiff was examined for the purpose of workman's compensation on November 3, 1992, by Michael D. Farrar, D.O. By a letter to Plaintiff's attorney dated February 24, 1993, Dr. Farrar summarized the amputation of Plaintiff's toe, and concluded that Plaintiff's injury occurred while he was working. Dr. Farrar noted that Plaintiff had a full range of motion in his shoulders, elbows, and fingers, and had good

gross and fine finger manipulative abilities. In addition, Plaintiff's lower extremities revealed a full range of motion to the hips, ankles, and feet. [R. at 104]. Dr. Farrar noted that Plaintiff's left foot showed signs of amputation of the toe, but that the area was now healed "with the exception of a scabbed wound." [R. at 104]. Dr. Farrar concluded that Plaintiff was temporarily totally disabled only from July 9, 1992 until January 28, 1993. [R. at 104-05]. Dr. Farrar additionally concluded that Plaintiff had a 35% permanent partial impairment to his left foot for the purpose of workman's compensation. [R. at 105]. Dr. Farrar additionally noted that vocational training would be required to return Plaintiff to work. [R. at 105].

Plaintiff stepped on a nail which punctured his right foot on June 15, 1994. On June 17, 1994 he sought treatment for swelling. Plaintiff was placed on antibiotics and was instructed to use Betadine soaks every eight hours for his foot. [R. at 138]. Plaintiff's symptoms cleared after treatment, and Plaintiff was discharged on July 22, 1994. [R. at 138]. Plaintiff was instructed to initially use crutches and avoid heavy weight bearing for two weeks. [R. at 136].

Plaintiff's medications list indicates that he takes medications for diabetes and high blood pressure. [R. at 135].

Plaintiff was examined by John W. Hickman, Ph.D., on September 14, 1994. Dr. Hickman noted that Plaintiff's speech was normal and his thought processes were clear. [R. at 145]. Plaintiff's reported activities included managing pool tournaments, driving a car, performing various chores around the house, and requiring glasses to read the paper. [R. at 145-46]. Dr. Hickman administered a Wechsler Adult

Intelligence Scale, Revised. Dr. Hickman noted that Plaintiff appeared to make minimal effort on the test. Plaintiff's verbal I.Q. was noted as 71, performance I.Q. at 73, and full-scale I.Q. at 71. [R. at 146].

At the hearing Plaintiff testified that he was shot with a .22 caliber gun at the age of 22, that he takes insulin and pills for his diabetes, that he sometimes has breathing problems, and that he has high blood pressure. [R. at 158-62]. Plaintiff testified that he completed the ninth grade, but left school because he would have had to repeat several classes. [R. at 163].

Plaintiff stated that he can drive approximately 150 miles, but that his feet sometimes swell. [R. at 167]. Plaintiff testified that he can walk approximately one-half of one mile in fifteen minutes. [R. at 171]. According to Plaintiff, he is able to do some math, sometimes reads the headlines in newspapers, does laundry, washes dishes, and is able to cook a little although he sometimes forgets he is cooking and burns the food. [R. at 175]. Plaintiff shops for groceries, does yard work, and shoots pool. [R. at 176]. Plaintiff also organizes a pool tournament on Friday evenings. [R. at 177]. Plaintiff testified that he could sit approximately thirty minutes, but his feet would swell, and that he can lift approximately fifty pounds, but not for very long. [R. at 182].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.[3/] See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

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[3/] Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[4/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

4/ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was not disabled at Step Five of the Sequential Evaluation. The ALJ concluded, based on Plaintiff's treating physician's records and the testimony of a vocational expert, that Plaintiff would be unable to return to his past job as a roofer. Based on the medical evidence, the ALJ found that Plaintiff's physical ability to perform work was not effected with the exception of Plaintiff's ability to walk. The ALJ additionally noted that Dr. Hickman reported that Plaintiff's results on his intelligence tests probably underestimated Plaintiff's intelligence. Based on the testimony of a vocational expert, the ALJ concluded that a substantial number of jobs existed in the national economy which Plaintiff was capable of performing.

IV. REVIEW

Consideration of the Exhibit

Plaintiff initially asserts that the ALJ erred because the ALJ failed to consider the entire exhibit, or report, which was submitted by Dr. Hickman. Plaintiff asserts that part of Dr. Hickman's report suggests that an additional test (Wechsler Memory

Scale) should be administered to Plaintiff, and that the ALJ erred in failing to order this test.

Dr. Hickman administered a Wechsler Adult Intelligence test. He noted in his report that:

> [Plaintiff] appeared to make rather minimal effort on the test and would give up easily. He would often say "I don't know" as an answer. He had to be constantly encouraged to respond and as such his scores were felt to be an under-estimation of his intellectual ability. . . . These scores would seem to place Mr. Yahola in the borderline range of mental ability at the present time, although they are thought to be somewhat under-estimations of his intellectual functioning and there are questions as to his degree of motivation while taking the test which was also noticed in the clinical interview.

[R. at 146]. Dr. Hickman additionally noted that:

> However there is also a possibility, since he is reported to have diabetes, there may be some degree of cognitive deterioration occurring, particularly with memory functions, that it might be worthwhile to further check up through the administration of the Wechsler Memory Scale.

[R. at 146-47]. Plaintiff seemingly asserts that the ALJ's failure to request this additional test constitutes reversible error. The Court cannot agree.

The relevant inquiry with respect to any asserted impairment is to what degree that impairment effects an individual's ability to work. In this case, the ALJ presented a hypothetical question to the vocational expert which included Plaintiff's various limitations. [R. at 190]. Based on the hypothetical, the vocational expert testified that Plaintiff could perform the jobs of assembly worker and inspector, which are sedentary level jobs. [R. at 191]. According to the vocational expert, "[t]he other jobs that are

at a sedentary level require at least a fair ability to read, write and use numbers." The vocational expert noted that the assembly job is "generally classified as being simple, repetitive with one or two-step tasks. It would not have a heavy demand on the memory certainly if I person continued to be asked for work instructions or what do I do next that would not be able to do it." [R. at 192]. The vocational expert additionally testified that the jobs he described would allow an individual an opportunity to elevate his foot on a foot stool. [R. at 193]. Finally, the ALJ asked the vocational expert whether an individual with an I.Q. between 70 and 80 would be able to perform the jobs outlined by the vocational expert. The expert responded "yes." [R. at 195].

The I.Q. test administered by Dr. Hickman indicated that Plaintiff has an overall I.Q. of 71. Dr. Hickman additionally noted that he believed this was an underestimation of Plaintiff's intelligence. However, as noted by Plaintiff, Dr. Hickman also stated that the possibility existed that Plaintiff could be experiencing some deterioration of his memory and suggested that another test could be helpful. However, even assuming that Plaintiff was experiencing some memory deterioration, at the time the test was administered, or on September 14, 1994, Plaintiff had an I.Q. of at least 71. According to the testimony of the vocational expert, an individual with an I.Q. of 71, could perform the unskilled sedentary jobs of assembly worker and inspector.

Plaintiff does not challenge the question presented to the vocational expert, the testimony of the vocational expert, or the jobs which the vocational expert states

Plaintiff can perform. The testimony of the vocational expert provides substantial evidence that Plaintiff is capable of performing jobs in the national economy. The "failure" of the ALJ to order the additional test suggested by Dr. Hickman does not require a reversal of the decision of the ALJ.

Failure of the Appeals Council

Plaintiff's second asserted error is that the Appeals Council failed to properly consider additional evidence. Plaintiff asserts only that, "The Appeals Council compounded the initial error of the trial judge. New evidence further demonstrating the claimant's limitations was presented to the council; that evidence resulted in a finding that 'there is no basis under the above regulations for granting your request for review.'" Plaintiff does not specify which evidence was presented to the Appeals Council, does not explain why the Appeals Council erred in the consideration of the evidence, and does not identify the initial error of the trial judge which the Appeals Council "compounded."

The ALJ's decision is dated March 23, 1995, and the hearing before the ALJ occurred on August 22, 1994. A document dated February 10, 1995, and noted "Health Examination" by the Wewoka Agency -- Branch of Social Services, notes that Plaintiff claims he is unable to perform manual labor. [R. at 13]. The document additionally indicates that Plaintiff's "approximate length of continued incapacity," is "indefinite." The question "can patient be made employable by treatment" is answered as "doubtful." [R. at 13]. The Court cannot find that the Appeals Council erred by failing to reverse the decision of the ALJ based on such records. The record

does not indicate the relationship of the individual completing the form to the Plaintiff, does not indicate the basis for the individual's "findings," and does not specify whether such "findings" are limited to Plaintiff's performance of manual labor (which the ALJ concluded Plaintiff could not perform). The Appeals Council concluded that the February 10, 1995, letter indicated only that Plaintiff was unable to perform manual work and was therefore not inconsistent with the ALJ's findings. The Appeals Council also noted that although the result of Plaintiff's intellectual testing was "low," it did not indicate that Plaintiff could not work.

Plaintiff does not challenge the reasons given by the Appeals Council for discounting the additionally submitted evidence. The Court cannot conclude that the Appeals Council actions were improper based on the record before it.

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 10 day of December 1996.

Sam A. Joyner
United States Magistrate Judge

12-12-96.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. PATRICIA MICHELLE JAGGERS; UNKNOWN SPOUSE OF Patricia Michelle Jaggers, if any; RONALD DEAN JAGGERS aka Ronnie Dean Jaggers aka Ron D. Jaggers; UNKNOWN SPOUSE OF Ronald Dean Jaggers aka Ronnie Dean Jagger aka Ron D. Jaggers, if any; COMMONWEALTH MORTGAGE CORPORATION OF AMERICA successor by merger to Commonwealth Mortgage Company of America, L.P.; KENNETH E. WAGNER; JEANNE R. WAGNER; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	**FILED** DEC 10 1996 Phil Lombardi, Clerk U.S. DISTRICT COURT Civil Case No. 95-C 432K ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9th day of December, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendants, PATRICIA MICHELLE JAGGERS and RONALD DEAN JAGGERS, appear by their attorney, Charles Whitman; the Defendants, KENNETH E. WAGNER and JEANNE R. WAGNER, appear by their attorney, Georgenia

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Brown; and the Defendant, COMMONWEALTH MORTGAGE CORPORATION OF AMERICA, successor by merger to Commonwealth Mortgage Company of America, L.P., appears not having previously filed a Disclaimer.

The Court being fully advised and having examined the court file finds that the Defendant, PATRICIA MICHELLE JAGGERS, was served a copy of Summons and Complaint on August 21, 1995, by Certified Mail; that the Defendant, KENNETH E. WAGNER, signed a Waiver of Summons on September 1, 1995; and that the Defendant, JEANNE R. WAGNER, signed a Waiver of Summons on September 1, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 31, 1995; that the Defendants, PATRICIA MICHELLE JAGGERS and RONALD DEAN JAGGERS, filed their Answer on September 27, 1995; that the Defendants, KENNETH E. WAGNER and JEANNE R. WAGNER, filed their Answer on October 6, 1995; and that the Defendant, COMMONWEALTH MORTGAGE CORPORATION OF AMERICA, successor by merger to Commonwealth Mortgage Company of America, L.P., filed its Disclaimer on June 12, 1995.

The Court further finds that the Defendant, UNKNOWN SPOUSE OF Patricia Michelle Jaggers, if any is one and the same person as RONALD DEAN JAGGERS. The Defendant, UNKNOWN SPOUSE OF Ronald Dean Jaggers, if any is one and the same person as Patricia Michelle Jaggers. The Defendant, RONALD DEAN JAGGERS, is one and the same person as Ron D. Jaggers, and will hereinafter be referred to as RONALD DEAN JAGGERS. The Defendants, RONALD DEAN JAGGERS and PATRICIA MICHELLE

JAGGERS, are husband and wife. The Defendants, KENNETH E. WAGNER and JEANNE R. WAGNER, are husband and wife.

The Court further finds that the Defendant, RONALD DEAN JAGGERS, is not the same person as RONNIE DEAN JAGGERS, as stated in the Complaint in Paragraph #4, who on October 2, 1990, filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-2900. On January 14, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on March 18, 1991.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Five (5), Block Four (4), WESTFUL VISTA, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat No. 1601

The Court further finds that on September 29, 1977, John Raymond McGuire and Barbara Ann McGuire, executed and delivered to FIRST CONTINENTAL MORTGAGE CO., A CORPORATION, their mortgage note in the amount of $33,650.00, payable in monthly installments, with interest thereon at the rate of Eight and One-Half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, John Raymond McGuire and Barbara Ann McGuire, husband and wife, executed and delivered to FIRST CONTINENTAL MORTGAGE CO., A CORPORATION, a mortgage dated September 29, 1977, covering the above-described property. Said mortgage was

recorded on October 4, 1977, in Book 4287, Page 370, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 4, 1987, COMMONWEALTH SAVINGS ASSOCIATION, successor by merger to First Continental Mortgage Co., assigned the above-described mortgage note and mortgage to COMMONWEALTH MORTGAGE COMPANY OF AMERICA. This Assignment of Mortgage was recorded on June 17, 1987, in Book 5031, Page 1626, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 19, 1990, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P. by its general partner, Commonwealth Mortgage Corporation of America, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on May 25, 1990, in Book 5255, Page 971, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, RONALD DEAN JAGGERS and PATRICIA MICHELLE JAGGERS, currently hold title to the property by virtue of a General Warranty Deed, dated February 26, 1986, and recorded on March 19, 1986, in Book 4930, Page 2967, in the records of Tulsa County, Oklahoma, and are the current assumptors of the subject indebtedness.

The Court further finds that on February 28, 1990, the Defendants, PATRICIA MICHELLE JAGGERS and RONALD DEAN JAGGERS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached

between the Plaintiff and the Defendant, PATRICIA MICHELLE JAGGERS on February 25, 1991 and October 5, 1991.

The Court further finds that the Defendants, PATRICIA MICHELLE JAGGERS and RONALD DEAN JAGGERS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, PATRICIA MICHELLE JAGGERS and RONALD DEAN JAGGERS, are indebted to the Plaintiff in the principal sum of $44,297.30, plus interest at the rate of 8.5 percent per annum from March 10, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $10.00 which became a lien on the property as of July 2, 1990, a lien in the amount of $29.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of $29.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, KENNETH E. WAGNER and JEANNE R. WAGNER, have a lien on the property which is the subject matter of this action by virtue of a second real estate mortgage in the amount of $27,875.91 which became a lien on the property as of March 19, 1986. Said second real estate mortgage is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, COMMONWEALTH MORTGAGE CORPORATION OF AMERICA, successor by merger to Commonwealth Mortgage Company of America, L.P., Disclaims any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, PATRICIA MICHELLE JAGGERS and RONALD DEAN JAGGERS, in the principal sum of $44,297.30, plus interest at the rate of 8.5 percent per annum from March 10, 1995 until judgment, plus interest thereafter at the current legal rate of 5.45 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $68.00, plus costs and interest, for personal property taxes for the years 1989, 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, KENNETH E. WAGNER and JEANNE R. WAGNER, have and recover judgment in the amount of $27,875.91 for their second real estate mortgage, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, COMMONWEALTH MORTGAGE CORPORATION OF AMERICA, successor by merger to Commonwealth Mortgage Company of America, L.P., PATRICIA MICHELLE JAGGERS and RONALD DEAN JAGGERS, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, PATRICIA MICHELLE JAGGERS and RONALD DEAN JAGGERS, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendants, KENNETH E. WAGNER and JEANNE R. WAGNER, in the amount of $27,875.91, second real estate mortgage.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $68.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

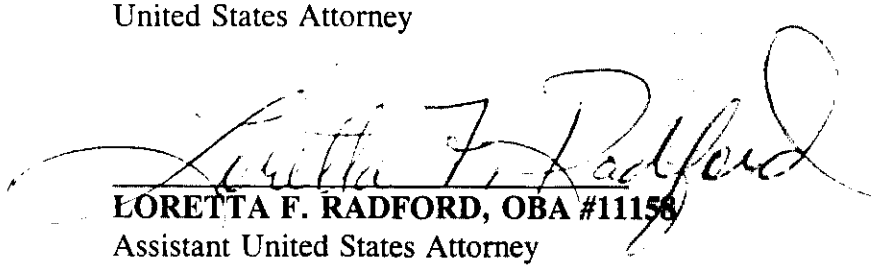
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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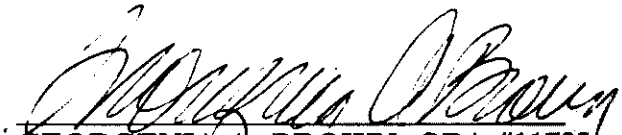

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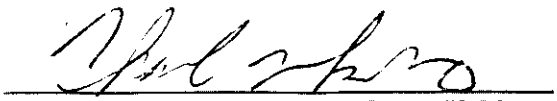

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Judgment of Foreclosure
Civil Action No. 95 C 432K

LFR:flv

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOMMY MEEKS,,
SSN: 441-44-9212,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 95-C-976-M

JUDGMENT

Judgment is hereby entered for **Plaintiff** and against Defendant. Dated this 11th day of Dec., 1996.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOMMY MEEKS
SSN 441-44-9212

Plaintiff,

vs.

SHIRLEY S. CHATER, [1] Commissioner Social Security Administration,

Defendant,

Case No. 95-C-976-M

ORDER

Plaintiff, Tommy Meeks, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.[2] In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Secretary has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017

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[1] Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-297. However, this order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

[2] Plaintiff's August 2, 1993 application for disability benefits was denied August 20, 1993 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held March 29, 1994. By decision dated October 5, 1994 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on August 4, 1995. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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(10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its discretion for that of the Secretary. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has properly outlined the required sequential analysis. The Court incorporates that information into this order as the duplication of effort would serve no purpose.

Plaintiff was 47 years old at the time of the disability hearing before the ALJ. He has a 12th grade education and a past relevant work history as a transmission mechanic. He alleges disability from December 13, 1991 due to low back pain with radiation into the right leg. Between January, 1992 and October, 1992 Plaintiff underwent three lumbar surgeries. The ALJ determined that as of June 1, 1993, there was improvement in Plaintiff's physical condition such that he could perform light work activity with some restrictions. Based on the testimony of a vocational expert the ALJ found that although Plaintiff could not return to his former work as a transmission mechanic, there were jobs available which he could perform.

Accordingly, the ALJ found that Plaintiff was entitled to a period of disability commencing December 13, 1991 which ceased on June 1, 1993. [R. 23-24].

Plaintiff does not contest that portion of the decision which awarded him disability from December 12, 1991 to June 1, 1993. However, Plaintiff alleges that the ALJ's determination that Plaintiff was not disabled after June 1, 1993 is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) relied upon incompetent vocational testimony; (2) failed to perform an analysis in accordance with 20 C.F.R. § 404.1594 to determine whether Plaintiff had undergone medical improvement; and (3) incorrectly evaluated Plaintiff's credibility.

CREDIBILITY & PAIN ANALYSIS

Plaintiff asserts that the medical evidence supports his complaints of pain and inability to engage in work activities on a sustained basis. The Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines.

The Court finds that based on the record before him, the ALJ evaluated Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts. However, Plaintiff submitted

additional medical records to the Appeals Council which indicate that after the March 29, 1994 disability hearing, but before the October 5, 1994 decision he received numerous refills of prescription pain medication, 4/19/94, 5/5/94, 5/19/94, 6/2/94, 7/14/94, 8/11/94, 8/25/94, 9/8/94, and 10/4/94. [R. 263-64]. In addition, Dr. Hawkins' office notes of June 7, and June 25, 1994 report that Plaintiff was suffering persistent pain and popping in his back. On October 17, 1994 he underwent his fourth back surgery in an effort to alleviate his back pain. The Appeals Council considered this additional evidence but concluded that the additional evidence did not provide a basis for changing the ALJ's decision. [R. 4].

Social Security regulations specify that:

> If new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

20 C.F.R. § 404.970 (b). Where, as here, the Appeals Council denies review, the ALJ's decision becomes the Secretary's final decision. *See* 20 C.F.R. § 404.981. The decision is reviewed for substantial evidence, based on "the record viewed as a whole." *O'Dell v. Shalala*, 44 F.3d 855, 858 (10th Cir. 1994) (quoting *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994)). In *O'Dell* the Tenth Circuit held that new evidence submitted to the Appeals Council

"becomes part of the administrative record to be considered when evaluating the Secretary's decision for substantial evidence." *O'Dell*, 44 F.3d at 859. The Court must therefore include the medical records submitted to the Appeals Council in its review of the ALJ decision.

The additional evidence documents Plaintiff's continued efforts to obtain pain relief, including his decision to undergo a fourth lumbar surgery which lends credibility to Plaintiff's claims of disabling pain. Since the new evidence bears directly on the credibility determination and was not included in the analysis, the Court cannot say that the decision is supported by substantial evidence in the record as a whole. Accordingly, the case must be remanded for consideration of this evidence.

The Court has determined that Plaintiff's other contentions are without merit. However, because the case is being remanded, the Court will proceed to address those matters.

MEDICAL IMPROVEMENT

Plaintiff asserts that "absolutely no credible evidence supports the ALJ's conclusion that [he] was no longer disabled after June 1, 1993. Further, [Plaintiff] submits this finding is contrary to SSA regulations." [Dkt. 4, p.4]. Plaintiff asserts that before finding that he was no longer disabled after June 1, 1993, the ALJ was required to perform the eight-step benefit evaluation set out in 20 C.F.R. § 404.1594. According to Plaintiff, failure to do so was reversible error. Plaintiff does not cite any case authority to support this assertion.

The Tenth Circuit has not, in a published opinion, directly addressed whether the so-called medical improvement standard of 20 C.F.R. §404.1594 applies to closed period of disability cases, such as this one. However, there are Tenth Circuit opinions which address the proper use of the medical improvement standards. In *Brown v. Sullivan*, 912 F.2d 1194 (10th Cir. 1990) Plaintiff was awarded benefits in 1972 which were terminated in 1982. The termination was not appealed. Denial of Plaintiff's subsequent application for benefits was appealed. The Tenth Circuit rejected Plaintiff's assertion that the medical improvement standard rather than the standard for new disability claims applied to his case. The Court, citing *Richardson v. Bowen*, 807 F.2d 444, 445-46 (5th Cir. 1987), stated "the medical improvement standard applies only in termination cases, not in later applications." *Brown*, 912 F.2d at 1196 [emphasis supplied]. In *Richardson*, the Fifth Circuit determined that the medical improvement standard applies only to termination cases, not new applications.

The instant case is not a benefit termination. A termination case is one in which there has been a previous decision in favor of disability, followed by receipt of benefits, and further followed by a new proceeding resulting in cessation of benefits. This case is concerned with a new application for benefits, only. The distinction between these situations is well recognized. See *Glenn v. Shalala*, 21 F.3d 983, 987 n.1 (10th Cir. 1994) (cases concerning initial benefit determinations not persuasive in termination of benefits case); *Camp v. Heckler*, 780 F.2d 721, 721-22 (8th Cir. 1986) (medical improvement not applicable to closed period); *Taylor v. Heckler*, 769

F.2d 201, 202 (4th Cir. 1985) (distinguishing between termination of currently received benefits and determination of discrete period of disability). Despite the ALJ's determination that Plaintiff was disabled for a while, this case is not a termination case and the medical improvement standards applicable only to termination cases do not apply. See ***Ness v. Sullivan***, 904 F.2d 432 (8th Cir. 1990); *Brown v. Chater*, 1995 WL 625915 (10th Cir. (Okl.), 1995). The Court therefore rejects the ALJ's failure to comply with 20 C.F.R. §404.1594 as a basis for reversal.

VOCATIONAL EXPERT TESTIMONY

In answering a hypothetical posed by the ALJ, the vocational expert identified a number of jobs available in Oklahoma and the national economy that one with Plaintiff's limitations could perform. These jobs were in both the light and sedentary range and included both semiskilled and unskilled categories. [R. 58-59]. Plaintiff asserts that some of the jobs the vocational expert categorized as unskilled are listed in the *Dictionary of Occupational Titles* (4th ed., rev. 1991) ("DOT") as semiskilled. He argues that the misclassification of the skill level calls the competency of the vocational expert's entire testimony into question. Plaintiff also argues error based upon the failure to identify whether he had any transferable skills that would enable him to perform the jobs identified.

Plaintiff is correct that the skill level the vocational expert identified for several of the positions he testified about does not match the DOT classification. However, that infirmity does not apply to all of the jobs identified by the vocational expert. For instance the vocational expert's testimony and the DOT agree that toll booth

attendant and arcade attendant are unskilled. [R. 59] DOT §§ 211.462.038; 342.667.014. These occupations were listed in the ALJ's findings as ones which plaintiff could perform, despite his impairments. [R. 22]. The vocational expert's misclassification of the skill level of some of the several occupations he identified does not afford a basis for reversal. Furthermore, based on Plaintiff's age of 47, the exertional capacity for light work, and his high school education, it is not relevant whether he had any transferrable skills. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2 §§ 201.00(d-h), 202.00(c-e); Rules 201.21 and 202.20.

CONCLUSION

The Secretary's decision is REVERSED and the case REMANDED for full consideration of the additional medical evidence submitted to the Appeals Council and for any further proceedings made necessary by such consideration.

SO ORDERED this 11th day of December, 1996.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HAWKINS-SMITH, an Idaho General Partnership

Plaintiff,

v.

SSI, INCORPORATED; UNITED STATES FIDELITY & GUARANTY COMPANY; and INTERNATIONAL ROOFING, INC.,

Defendants.

Case No. 95-C-0006

ORDER OF DEFAULT JUDGMENT

This matter comes before the Court pursuant a motion for default judgment by Defendant/Third-Party Plaintiff SSI, Incorporated against Defendant International Roofing, Inc.

Defendant International Roofing received full notice of these proceedings, as required by the Federal Rules of Civil Procedure, and had many opportunities to appear before this Court to contest the issues in this matter. However, International Roofing failed to appear, and thus this Court will enter a default judgment. Based on the evidence adduced at trial, and other evidence presented to the Court on the record, the Court concludes that the proper amount of damages to be awarded against International Roofing and in favor of SSI should be $225,000.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that based upon the evidence adduced at trial, and other evidence presented to the Court on the record, judgment is hereby entered against International Roofing and in favor of SSI, Incorporated, in the amount of $225,000 together with post-judgment interest at the rate provided by law, and a reasonable attorneys fee in the amount of $36,000.00.

IT IS SO ORDERED.

This 10TH day of DECEMBER, 1996.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HAWKINS-SMITH, an Idaho General Partnership

Plaintiff,

v.

SSI, INCORPORATED; UNITED STATES FIDELITY & GUARANTY COMPANY; and INTERNATIONAL ROOFING, INC.,

Defendants.

Case No. 95-C-0006

ORDER OF CONDITIONAL DISMISSAL

The parties herein have advised the Court that they have entered into a settlement agreement in the above-captioned case.

Pursuant to such agreement, no later than December 20, 1996 the parties will file either (i) an agreed-upon judgment, or (ii) an agreed-upon order of dismissal, each of which has been executed contemporaneously herewith. This case is hereby dismissed, provided that the parties conform to this condition of dismissal. If, by December 31, 1996 neither the judgment nor the order of dismissal has been filed, the Court will dismiss this action with prejudice.

IT IS SO ORDERED.

This 10TH day of December, 1996.

Sven Erik Holmes
United States District Judge

STC

FILED

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEC 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

James D. Young, an individual,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 96-CV-1035-B
	)	
Town of Kiefer, an incorporated town; and James Poulin, in his personal capacity,	)	
	)	
Defendants.	)	

EOD 12/11/96

STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiff James D. Young stipulates that upon order of the court this case may be dismissed against these defendants with prejudice toward the bringing of any future action. Plaintiff advises the court that the defendants have not been served with summons.

E. Scott Pruitt
Cityplex Towers, Suite 4550
2448 East 81st St.
Tulsa, OK 74137-4237
Attorney for Plaintiff

mailed
copy
no copy

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CALLAWAY GOLF COMPANY, a California Corporation,

Plaintiff,

v.

MIKE CHAMPLAIN, an individual, doing business as PIN HIGH CUSTOM GOLF,

Defendant.

Case No. 96CV1105E

ORDER OF JUDGMENT

Based on the stipulations of the parties and the representations of counsel, it is hereby ORDERED that:

1. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1338(a)-(b), and 1367(a), and venue is proper in this judicial district under 28 U.S.C. § 1391(b), (c) and (d);

2. Judgment is entered in favor of Callaway Golf Company and against defendant, Mike Champlain, as follows:

3. The temporary restraining order entered by the Court on December 2, 1996, is vacated, and Callaway Golf shall recover the full amount of the bond it posted for the temporary restraining order;

4. Defendant, Mike Champlain, doing business as Pin High Custom Golf, and his agents, servants, employees, attorneys, successors and assigns, and all persons, firms, and corporations acting in concert or participation with them who receive actual notice of this order by personal service or otherwise, are hereby

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perpetually enjoined and restrained from doing any of the following without permission from Callaway Golf Company:

A. Manufacturing, producing, distributing, circulating, selling, offering for sale, importing, exporting, advertising, promoting, displaying, shipping, marketing, or otherwise disposing of counterfeit Callaway® Great Big Bertha® woods or Callaway® Big Bertha® irons;

B. Using, manufacturing, producing, distributing, circulating, selling, offering for sale, importing, exporting, advertising, promoting, displaying, shipping, marketing, or otherwise disposing of any golf clubs, club heads, medallions, shafts or other products or things (not manufactured by Callaway Golf) that bear any simulation, reproduction, counterfeit, copy or colorable imitation of Callaway Golf's Registered Trademarks, including GREAT BIG BERTHA (Registration No. 1,982,951); Callaway and Design (Registration No. 1,768,763); the Chevron (Registration No. 1,918,107); S_2H_2 and Design (Registration No. 1,506,114); and WAR BIRD (Registration No. 1,867,722) (collectively, "Registered Trademarks");

C. Manufacturing, producing, distributing, circulating, selling, offering for sale, importing, exporting, advertising, promoting, displaying, shipping, marketing, or otherwise disposing of "Big Bursar" iron golf clubs, golf club heads or medallions;

D. From using in any unauthorized manner the federally registered trademarks GREAT BIG BERTHA; Callaway and Design; the Chevron; S_2H_2 and Design; and WAR BIRD, or any other mark or term confusingly similar thereto;

E. From using Trademarks or Trade Dress of Plaintiff in connection with importing, exporting, manufacturing, buying, offering for sale, advertising, exporting or selling golf clubs and golf club components;

F. From unfairly competing with Plaintiff in connection with the use of the aforementioned marks or trade dress, or otherwise unfairly competing with Plaintiff.

G. Engaging in any other activity constituting an infringement of Callaway Golf's trademarks or trade dress, or of Callaway Golf's rights in, or to use or to exploit, its trademarks or trade dress, or constituting any dilution of Callaway Golf's trademarks, trade dress, name, reputation or goodwill;

H. Passing off or otherwise representing to the public in any way that any product sold by them emanates from or is related in source, affiliation or sponsorship or any other way to Callaway Golf or Callaway Golf's products when such is not true in fact;

I. Assisting, aiding or abetting any other person or entity in engaging in or performing any of the activities referred to in Paragraphs 4(A) through (I) above;

5. Each party shall bear its own costs and attorney fees;

6. The pleadings and other filings in this matter shall be and are ordered to be UNSEALED; and,

7. This Court will retain jurisdiction to consider any dispute or claim for relief arising hereunder, or any action to enforce the terms of this judgment or the Confidential Settlement Agreement entered into between the parties.

Done this 10TH day of December, 1996.

United States District Court Judge

APPROVED AS TO FORM:

DOERNER, SAUNDERS, DANIEL & ANDERSON

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